(25,114)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 367.

ROBERT H. GARDINER, TRUSTEE OF THE PERRY REAL ESTATE TRUST, PETITIONER,

vs.

WILLIAM S. BUTLER & COMPANY, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

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a United States Circuit Court of Appeals for the First Circuit, October Term, 1914.

No. 1102.

ROBERT H. GARDINER, Trustee, Claimant, Appellant,

v.

WM. S. BUTLER & COMPANY, INC., et al., Appellees.

Appeal from the District Court of the United States for the District of Massachusetts from Final Decree (Dodge, J.), December 12, 1914.

Transcript of Record.

Alexander Whiteside, Warren, Garfield, Whiteside & Lamson, for Appellant.
Frederick H. Nash, Choate, Hall & Stewart, for Appellees.

Boston: Printed under direction of the clerk. 1915.

1 United States Circuit Court of Appeals for the First Circuit, October Term, 1914.

No. 1102.

ROBERT H. GARDINER, Trustee, Claimant, Appellant,

v.

WM. S. BUTLER & COMPANY, INC., et al., Appellees.

Transcript of Record of District Court.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

At a District Court of the United States begun and holden at Boston within and for the District of Massachusetts, on the first Tuesday of December, being the first day of December, in the year of our Lord one thousand nine hundred and fourteen.

Before The Honorable James M. Morton, Jr., District Judge.

No. 396, Equity Docket.

ISAAC MCLEAN SONS COMPANY, Complainant,
v.
WILLIAM S. BUTLER & COMPANY, INCORPORATED, Defendant.

In re Claims of ROBERT H. GARDINER, Trustee,
v.
WILLIAM S. BUTLER & COMPANY, INCORPORATED, and EVERYBODY'S STORE, INCORPORATED.

2 The Bill of Complaint in this cause was filed in the clerk's office on the seventh day of November, A. D. 1912, and was duly entered at the September Term of this court, A. D. 1912, and is as follows:—

Bill of Complaint.

[Filed November 7, 1912.]

ISAAC MCLEAN SONS COMPANY, a Corporation Organized and Existing under the Laws of the State of Maine, with Its Principal Office at Portland, in the State of Maine, a Citizen and Resident of the State of Maine, Complainant,

against

WILLIAM S. BUTLER & COMPANY, INCORPORATED, a Corporation Organized and Existing under the Laws of the State of Massachusetts, with Its Principal Office at Boston, in said District, a Citizen and Resident of Massachusetts, Respondent.

Isaac McLean Sons Company, a citizen and resident of the State of Maine, which brings this bill in equity in behalf of itself and all other creditors of the respondent, a citizen and resident of the State of Massachusetts, complains as follows:—

1. That the respondent is now indebted to the complainant for work and materials performed and furnished by the complainant to the respondent in an amount of not less than twenty-five thousand dollars ($25,000), with interest thereon; that the said indebtedness is on open account and is now due and payable, with the exception of two (2) promissory notes, each for ten thousand dollars ($10,000), taken on account of a portion thereof, which are not yet due; that the greater part of said indebtedness is overdue, but though often demanded, all said indebtedness has remained wholly unpaid.

Upon information and belief, the complainant alleges as follows:

2. That the respondent is indebted to other persons and corporations to an amount approximating seven hundred thousand dollars ($700,000), said indebtedness consisting of merchandise indebtedness and obligations upon promissory notes due and to become due

to banks and individuals, the payment of which to a large amount is now due and has been demanded.

3. The respondent is unable to meet its obligations and liabilities as they mature in the ordinary course of business, and at-
3 tempts to collect said debts now due by legal proceedings are threatened and imminent. The complainant says that it might be futile for it to pursue its ordinary remedies at law, and that it would be unjust and inequitable for it or other creditors to attempt to gain a preference over other creditors in the time or manner of settlement of their claims.

4. The respondent is engaged in the business of operating a retail dry goods store on the corner of Washington and Winter Streets in said Boston, and has invested very large sums aggregating more than two hundred and fifty thousand dollars ($250,000) in stocks of new and fresh merchandise which are immediately available for sale at a profit if the business is carried on without interruption, but which would have to be sold at great sacrifice if the business should be permitted to cease. The store occupied by the respondent has recently been fitted with new and expensive fixtures furnished by the complainant, which make it attractive to the purchasing public, and which are of great value to a going concern, but which would be of practically no value if sold apart from the business.

5. The respondent is lessee under a written lease of the premises which it occupies, expiring as to certain parcels on February 27, 1921, as to a certain other parcel on December 30, 1920, and as to a certain other parcel on December 30, 1918. Said lease provides that it may be terminated by the lessor if the lessee shall be declared bankrupt or insolvent, but that if a receiver is appointed of the lessee's property, the lease shall not be terminated upon that account unless the receiver is not discharged within ninety (90) days from the date of his appointment. Said lease is of great value to the respondent and would be of great value to any purchaser of its business as a going concern. If attachments should be placed upon the respondent's property and the respondent should thereupon be adjudicated a bankrupt, the value of said lease would be wholly lost to the creditors of the respondent.

6. The respondent and its predecessors, under the popular name of "Butler's Store," during many years of continuous business in Boston have built up a good-will of great value which would
4 be almost wholly lost to the respondent and its creditors if the business should be permitted to cease.

7. The respondent is without sufficient cash, capital or quick assets to carry on its business, and is without adequate credit, and is unable to raise by loan or otherwise the money immediately needed for carrying on its business. Because of its lack of money and credit, it will be obliged immediately to close its store and sacrifice its assets unless a receiver is appointed and empowered to borrow money upon receiver's certificates.

8. That for the reasons hereinabove set forth the complainant is without adequate remedy for the collection of the indebtedness due to the complainant from the respondent as aforesaid without the in-

tervention of a court of equity, and the appointment of a receiver to continue the business of the respondent and protect the value of its assets until sufficient sums can be realized, either from the continuance of the business or the sale of its assets, to discharge the indebtedness of the respondent or to distribute its assets so that all its creditors may share equitably therein.

Wherefore, the complainant prays that a receiver or receivers be forthwith appointed to take possession of the assets of the respondent and administer the same with full power to manage and operate the property of the respondent, with authority to continue its business, employ agents and employees and, with the approval of the court, to borrow money and issue receiver's certificates therefor.

And the complainant further prays that its respective debt and the debts of all other creditors who join in these proceedings may be established, and that the assets of the respondent may be equitably applied as the court may direct in satisfaction thereof.

And the complainant prays that the respondent, its directors, officers, agents and all other persons may be restrained by injunction from interfering with or disposing of said property, or any part thereof, or any income or proceeds therefrom.

And the complainant prays for such further orders and relief as to this court may seem meet and proper.

ISAAC McLEAN SONS COMPANY,
By WILLIAM F. WHARTON,
Solicitor and of Counsel for Complainant.

5 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

BOSTON, November 7, 1912.

Then personally appeared, before me, G. S. R. McLean, treasurer of the complainant above named, who, being duly sworn, made oath that he had read the foregoing bill of complaint, and knew the contents thereof, and that the same is true to the best of his knowledge, excepting as to the matters therein stated on information and belief, and as to those matters, he verily believes them to be true.

Before me,

[SEAL.] FREDERICK H. NASH,
Notary Public.

On the same day the following Answer of Respondent was filed:

Answer of Respondent.

[Filed November 7, 1912.]

Now comes the respondent above named, and for answer to the bill of complaint respectfully avers that the matters and things stated in said bill of complaint are true.

Wherefore, this respondent submits its rights to the court, and prays that a decree may be made accordingly.

FREDERICK H. NASH,
Solicitor and of Counsel for the Respondent.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

BOSTON, November 6, 1912.

Charles F. Weed, being duly sworn, deposes and says that he is the treasurer of the William S. Butler & Company, Incorporated; that he has read the bill of complaint and the foregoing answer, and knows the contents thereof, and that the allegations of the bill of complaint and of the answer are true to the best of his knowledge and belief.

CHARLES F. WEED.

Subscribed and sworn to, before me, this — day of November, 1912.

FREDERICK H. NASH,
Notary Public.

6 Also on the same day the following Decree was entered appointing Charles F. Weed and Milroy H. Gibson, Receivers:—

Decree Appointing Receivers.

November 7, 1912.

COLT, *J.:*

On this seventh day of November, 1912, comes the complainant in this cause, by its attorneys, and upon consideration of the bill of complaint and the answer thereto, and on motion of counsel for the complainant, the respondent, by its attorney, consenting thereto, it is ordered, adjudged and decreed that Charles F. Weed, of Brookline, and Milroy H. Gibson, of Boston, both in Massachusetts, be, and they hereby are, appointed receivers of all the assets and property of the respondent, wheresoever situated, and the moneys, contracts, debts, choses in action, books of account, deeds and documents, belonging to the respondent or relating to or arising from its property or business; and they are directed to file with the clerk of this court within two days from this date their several bonds with surety or sureties, to be approved by the clerk, in the sum of fifty thousand dollars each. Said receivers are hereby authorized and directed to take into their possession forthwith all the assets and property of the respondent wheresoever situated, to carry on the business of the respondent until further order of the court, and for that purpose to purchase such materials and supplies, employ and pay such counsel, servants and agents, contract for such labor, and subject to the direction and approval of this court take such other steps and enter into such obligations and agreements as shall be reasonably necessary; to insure any property of the respondent which they may think proper; to collect and receive all sums due or payable to the respondent, or arising from the conduct of its business by the receivers; to pay any accrued rent for the preservation of leases; and under the direction of the court to institute and prosecute all such actions, suits and proceedings as they may think proper and for the protection and preservation of the respondent's assets or for recovering possession thereof;

to defend any and all actions, suits and proceedings against
7 the respondent or against the receivers in respect of their acts or management as such; and out of the moneys to be received by them as aforesaid to pay all taxes and assessments lawfully laid or assessed upon or in respect of the property or business of the respondent, and all expenses and obligations properly incurred by them in carrying on the said business, or otherwise in connection with the premises. The said receivers shall deposit all moneys coming into their hands as aforesaid in some suitable bank or trust company in the City of Boston.

It is further ordered, adjudged and decreed that the respondent, its officers and agents, be, and they hereby are, restrained and enjoined, until further order of this court, from interfering with, transferring, encumbering, selling or disposing of any of the property of the respondent; and from taking or withholding possession thereof, or in any way interfering with the possession or management of any part of the said property or of the business of the respondent by the receivers hereby appointed, and from further conducting the business of the respondent or any part thereof, except through and under the receivers and their agents and employees.

By the Court,

CHARLES K. DARLING, *Clerk*,
By JOHN E. GILMAN, JR., *Deputy Clerk*.

Also on the same day, the following Petition was filed:—

Petition of Everybody's Store, Incorporated, to be Made a Party, and that the Receivership under the Bill of Complaint be Extended to Its Property.

[Filed November 7, 1912.]

Respectfully represents Everybody's Store, Incorporated, a corporation organized and existing under the laws of the State of Massachusetts, with its principal office at Boston in said district:

1. That it is engaged in the business of operating a retail department or dry goods store on the corner of Tremont and Bosworth Streets in said Boston; that all its stock is owned by the trustees
of a voluntary association called The Butler Companies, who
8 also own all the stock of the respondent, William S. Butler & Company, Incorporated, and of the intervening petitioner, Gilchrist Company; that the treasurer and managing officers of said voluntary association and of this petitioner and of the respondent, William S. Butler & Company, Incorporated, and of the intervening petitioner, Gilchrist Company, until November 1, 1912, was William E. Butler, late of Brookline, deceased; that under the management of said William E. Butler the affairs of this petitioner became in many respects mingled and confused with the affairs of the intervening petitioner, Gilchrist Company, and of the respondent, William S. Butler & Company.

2. That this petitioner is solvent, but it apprehends that because

of the close association between itself and the said respondent and the intervening petitioner, Gilchrist Company, and the mingling and confusion in their affairs, if a receiver is appointed for said respondent, William S. Butler & Company, Incorporated, the effect of such action will be to precipitate upon this petitioner all its creditors and impair its credit, and so it will be unable to raise by loan or otherwise the money immediately needed for carrying on its business, and will be obliged to close its store and sacrifice its assets, unless the prayers of this petition be granted.

3. That this petitioner and its predecessors at its place of business during many years of continuous business in Boston, have built up a good-will of great value which would be almost wholly lost to the respondent and its creditors if the business should be permitted to cease.

4. That this petitioner is lessee under written leases of the premises which it occupies expiring in 1914, 1915, 1916, 1920, 1921, 1932, 1946 and 1954, respectively; that said leases are of great value to this petitioner, and would be of great value to any purchaser of its business as a going concern. If attachments should be placed upon this petitioner's property and its credit should be impaired and it should thereafter be adjudicated a bankrupt, or if the leasehold interests of this petitioner should be taken on execution, the lessor would enter and terminate said lease, and the value hereof would be wholly lost to this petitioner and its creditors.

9 5. That this petitioner has invested large sums, aggregating about one hundred and twenty-five thousand dollars ($125,000) in stocks of new and fresh merchandise, which are immediately available for sale at a profit if the business is carried on without interruption, but which would have to be sold at great sacrifice if the business should be permitted to cease; that the store occupied by this petitioner has recently been fitted with new and expensive fixtures, which make it attractive to the purchasing public, and which are of great value to a going concern, but which would be of practically no value if sold apart from the business.

Wherefore, this petitioner says that its affairs are so inextricably bound together with the affairs of said respondent and of said intervening petitioner, Gilchrist Company, that if a receiver should be appointed for said respondent and said intervening petitioner and all of their property shall be taken into custody of such officer, it is necessary for the interests of this petitioner and of its creditors and of all concerned that this petitioner be made a party respondent to this suit, and that the receivership of said William S. Butler & Company, Incorporated, be extended temporarily to the property of this petitioner.

Wherefore this petitioner prays,—

1. That it may be admitted as a party defendant to this suit.

2. That if a receiver or receivers be appointed to take possession of the assets of the respondent, the same receiver or receivers may be ordered to take possession of the assets of this petitioner and administer the same until the further order of this court, with full power to manage and operate the property of this petitioner, with authority

to continue its business, employ agents and employees, and with the approval of the court to borrow money and issue receivers' certificates therefor.

3. That the court may issue such further orders and grant such further relief as to this court may seem meet and proper.

EVERYBODY'S STORE, INCORPORATED,
By FREDERICK H. NASH,
Solicitor for the Petitioner.

10 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

BOSTON, November 7, 1912.

Charles F. Weed, being duly sworn, deposes and says that he is the treasurer of Everybody's Store, Incorporated, that he has read the foregoing petition and knows the contents thereof, and that the allegations thereof are true to the best of his knowledge and belief.

CHARLES F. WEED.

Subscribed and sworn to before me this seventh day of November, 1912.

[SEAL.] FREDERICK H. NASH,
Notary Public.

Also on the same day, the following Decree was entered on the foregoing petition:—

Decree upon the Petition of Everybody's Store, Incorporated, for Leave to Intervene upon the Petition of Everybody's Store, Incorporated, to be Made a Party, and That the Receivership under the Bill of Complaint be Extended to Its Property.

November 7, 1912.

COLT, *J.*:

On this seventh day of November, 1912, comes the petitioner for leave to intervene in this cause, Everybody's Store, Incorporated, by its attorneys, and upon consideration of the bill of complaint, and the answer hereto and this petition, it is ordered, adjudged and decreed that the petitioner, Everybody's Store, Incorporated, be made a party defendant in this suit, and that Charles F. Weed, of Brookline, and Milroy H. Gibson, of Boston, both in Massachusetts, be, and they hereby are, appointed receivers of all the assets and property of the respondent, wheresoever situated, and the moneys, contracts, debts, choses in action, books of accounts, deeds and documents, belonging to the respondent or relating to or arising from its property or business; and they are directed to file with the clerk of this court
11 within two days from this date their several bonds with surety or sureties, to be approved by the clerk, in the sum of thirty thousand dollars each. Said receivers are hereby authorized and directed to take into their possession forthwith all the assets and property of the respondent wheresoever situated, to carry on the business of

the respondent until further order of the court, and for that purpose to purchase such materials and supplies, employ and pay such counsel, servants and agents, contract for such labor, and, subject to the direction and approval of this court, take such other steps and enter into such obligations and agreements as shall be reasonably necessary; to insure any property of the respondent which they may think proper; to collect and receive all sums due or payable to the respondent, or arising from the conduct of its business by the receivers; to pay any accrued rent for the preservation of leases; and under the direction of the court to institute and prosecute all such actions, suits and proceedings as they may think proper and for the protection and preservation of the respondent's assets or for recovering possession thereof; to defend any and all actions, suits and proceedings against the respondent or against the receivers in respect of their acts or management as such; and, out of the moneys to be received by them as aforesaid, to pay all taxes and assessments lawfully laid or assessed upon or in respect of the property or business of the respondent and all expenses and obligations properly incurred by them in carrying on the said business, or otherwise in connection with the premises. The said receivers shall deposit all moneys coming into their hands as aforesaid in some suitable bank or trust company in the City of Boston.

It is further ordered, adjudged and decreed that the respondent, its officers and agents, be, and they hereby are, restrained and enjoined, until further order of this court, from interfering with, transferring, encumbering, selling or disposing of any of the property of the respondent; and from taking or withholding possession thereof, or in any way interfering with the possession or management of any part of the said property or of the business of the respondent by the receivers hereby appointed; and from further
12 conducting the business of the respondent or any part thereof, except through and under the receivers and their agents and employees.

By the Court,

CHARLES K. DARLING, *Clerk*,
By JOHN E. GILMAN, JR.,
Deputy Clerk.

On the eleventh day of said November, the following Order of Court Relative to Proof of Claims was entered:—

Order of Court Relative to Proof of Claims Against William S. Butler & Company, Incorporated.

November 11, 1912.

COLT, *J.*:

This cause came on to be heard upon the petition of the receivers, praying that an order be made fixing a time within which the claims of creditors against the estate and property of the respondent, William S. Butler & Company, Incorporated, in the hands of said

receivers shall be filed and proved. And it being apparent that such order is expedient and necessary, it is ordered, adjudged and decreed that all creditors of William S. Butler & Company, Incorporated, the respondent herein, present their claims made up as of November 7, 1912, verified by affidavit, to the receivers at their office at 451 Washington Street in the City of Boston, on or before January 1st, 1913, and that all persons or corporations whose claims are not presented in the manner and in the time herein specified shall be barred from participating in the distribution of the assets in the hands of the receivers under direction of this court, unless the court for good cause shall otherwise order.

And it is further ordered, adjudged and decreed that the receivers give notice of this order by publishing an attested copy thereof in the "Boston Herald," a newspaper published in the city of Boston, once each week for four successive weeks immediately following the entry of this order, and by mailing to all known creditors of
13 the said respondent, at their addresses as shown on the receivers' books, a printed copy of this order.

By the Court,

CHARLES K. DARLING, *Clerk*,
By JOHN E. GILMAN, JR.,
Deputy Clerk.

This cause was thence continued to the December Term, A. D. 1912, when, to wit, December 3, 1912, the following Decree appointing Edward B. Wilson Co-receiver of William S. Butler & Company, Incorporated, and Everybody's Store, Incorporated, was entered:—

Decree Appointing Co-receiver.

December 3, 1912.

COLT, *J.*:

This cause came on to be further heard on the third day of December, 1912, and thereupon, on the suggestion of counsel for the receivers that a co-receiver be appointed, it is ordered and decreed that Edward B. Wilson, of Newton, be, and he is, appointed co-receiver with Charles F. Weed and Milroy H. Gibson of the assets and property of William S. Butler & Company, Incorporated, Gilchrist Company, Everybody's Store, Incorporated, Bosworth Manufacturing Company, and Everybody's Co-operative Grocery Store, Incorporated, that he shall have the same powers and duties as are granted to said Weed and Gibson and imposed upon them by virtue of the decrees hereinbefore entered on November 7th, 11th and 12th, respectively, and that he shall file a bond, with surety or sureties, approved by the clerk of this court, in the same amount for each of said companies that each of said receivers has filed for said companies, respectively.

By the Court,

CHARLES K. DARLING, *Clerk*.

On the seventeenth day of said December, it was ordered by the court, the Honorable Le Baron B. Colt, Circuit Judge, duly assigned to hold said District Court, sitting, that the time for filing
14 claims by creditors of William S. Butler & Company, Incorporated, be extended to January 15, 1913.

Also on the same day, the following Petition of Receivers was filed:—

Petition of Receivers of William S. Butler & Company, Incorporated, for Leave to Sell Assets.

[Filed December 17, 1912.]

The receivers respectfully represent that they have on December 16, 1912, received an offer for the entire stock of merchandise of the Butler's Apparel Shops at 61 per cent of invoice cost of said merchandise; that the parties submitting the offer deposited with the receivers a certified check for ten thousand dollars ($10,000), to be returned if the offer shall not be accepted, and to be applied in part payment if the offer is accepted. The acceptance of said offer has the approval of the creditors' committee and is recommended by the receivers. Wherefore, the receivers pray that an order of notice may issue to all creditors of William S. Butler & Company, Incorporated, returnable Tuesday, December 24, at 11 o'clock, that they may show cause, if any they have, why the acceptance of said offer should not be authorized by the court.

CHARLES F. WEED,
MILROY H. GIBSON,
EDWARD B. WILSON,
Receivers,
By Their Solicitors, CHOATE, HALL & STEWART.

On the twenty-sixth day of December, A. D. 1912, the following Decree was entered on the foregoing petition:—

Decree on Petition of Receivers of William S. Butler & Company, Incorporated, for Leave to Sell Assets.

December 26, 1912.

COLT, *J.*:

This cause came on to be heard upon the petition of the
15 receivers filed December 17, 1912, for authority to sell merchandise, and it appearing that due notice was given to all creditors, in accordance with the order entered December 17th, it is ordered that the receivers may sell and deliver to R. H. White Company all the merchandise of William S. Butler & Company, Incorporated, remaining in their possession at the close of business December 24th, in consideration of 61 per cent of the invoice cost of said merchandise, payable cash on delivery.

It is further ordered that the injunction heretofore issued on November 7, 1912, restraining said William S. Butler & Company, Incorporated, from further transacting any business be, and the same is hereby, modified to the extent of permitting said company to execute a confirmatory bill of sale of said merchandise.

By the Court.

CHARLES K. DARLING, *Clerk.*

On the sixth day of January, A. D. 1913, the following Petition of Robert H. Gardiner, Trustee, was filed:—

Petition of Robert H. Gardiner, Trustee of the Perry Real Estate Trust, for Leave to Assume Custody of Demised Premises under Protection of His Rights as Lessor Thereof.

[Filed January 6, 1913.]

Respectfully represents Robert H. Gardiner, as he is trustee of the Perry Real Estate Trust under a declaration of trust dated October 1, 1904:

1. On December 19, 1910, your petitioner leased to William S. Butler & Company, Incorporated, for a term of nine years and four months beginning January 1, 1911, the premises described as follows: A lot of land with the brick building thereon situated and numbered 8 Bosworth Street, 15 to 20 Chapman Place and 33 to 37 Province Street, including such rights as the lessor may have in a passage leading from the demised premises through or over the rear portion of the estate No. 7 Bosworth Street to said Chapman
16 Place, and subject to certain leases or parts of the premises. Said William S. Butler & Company, Incorporated, occupied said premises under said lease, and thereafter on or about September 30, 1912, said William S. Butler & Company, Incorporated, assigned said lease to Everybody's Store, Incorporated, with the consent of your petitioner, and said Everybody's Store, Incorporated, occupied said premises under said lease until the appointment of the receivers of said William S. Butler & Company, Incorporated, and said Everybody's Store, Incorporated, by this Honorable Court in the above-entitled case on November 7, 1912, since which date said receivers have been in occupation of said premises.

2. Said receivers have notified your petitioner that they have elected not to affirm, assume or in any way be responsible under said lease, except for their actual use and occupation as such receivers, and that as such receivers they have now vacated said premises, and that they have requested your petitioner to assume the care and custody of the building and other property on said premises.

3. Certain persons claiming as subtenants or otherwise under said lessee of said premises are now occupying part of said premises and the remainder of said premises is now vacent. To prevent damage to said premises it is necessary that someone take the custody thereof. Your petitioner is willing to do so, in accordance with the request of said receivers, if by so doing his rights as lessor under said

lease shall not be jeopardized, and said lease and the covenants and obligations thereunder of said William S. Butler & Company, Incorporated, and Everybody's Store, Incorporated, shall remain in as full force and effect as if the possession of said Everybody's Store, Incorporated, had continued undisturbed.

Wherefore your petitioner prays,—

1. That this Honorable Court will make an order authorizing your petitioner to take the custody of said premises until such time as said Everybody's Store, Incorporated, shall relieve him thereof, and until such time to collect all moneys and rents from occupants or subtenants of said premises and make all necessary pay-
17 ments on account of said premises, and apply any balance of receipts towards the rent due under said lease, accounting to said Everybody's Store, Incorporated, for any balance, and that such action shall not jeopardize your petitioner's rights under said lease, but that said lease and the obligations and covenants thereunder of said William S. Butler & Company, Incorporated, and said Everybody's Store, Incorporated, shall remain in full force and effect as if the possession of said Everybody's Store, Incorporated, had continued undisturbed.

2. For such other relief as to this Honorable Court shall seem meet.

By His Attorney, ROBERT H. GARDINER, Jr.

On the same day, the following Order was entered on the foregoing petition:

Order on Petition of Robert H. Gardiner, Trustee of the Perry Real Estate Trust.

January 6, 1913.

Colt, *J.*:

The petition of Robert H. Gardiner, trustee of the Perry Real Estate Trust, for leave to assume the custody under protection of his rights as lessor thereof of the premises on Bosworth Street, Chapman Place and Province Court leased by him to William S. Butler & Company, Incorporated, which lease has been assigned to Everybody's Store, Incorporated, having been presented and considered, and it appearing that the receivers do not object to the allowance of said petition, it is ordered that said Robert H. Gardiner, trustee of the Perry Real Estate Trust, be authorized to assume the custody of said premises until such time as said Everybody's Store, Incorporated, shall relieve him thereof, and until such time to collect all moneys and rents from occupants or subtenants of said premises and make all necessary payments on account of said premises, and apply any balance of receipts toward the rent due to him under said lease, accounting to said Everybody's Store, Incorporated, for any balance, and it is further ordered that
18 such action shall not affect the rights of said Robert H. Gardiner as trustee as aforesaid under said lease, but that

said lease and the obligations and covenants thereunder of said William S. Butler & Company, Incorporated, and said Everybody's Store, Incorporated, shall remain in full force and effect as if the possession of said Everybody's Store, Incorporated, had continued undisturbed.

By the Court,

CHARLES K. DARLING, *Clerk.*

On the thirteenth day of said January, a motion of the National Union Bank for extension of time within which creditors may file proof of claims against William S. Butler & Company, Incorporated, was allowed by the court and the time was extended thirty days from January 15, 1913, to February 14, 1913.

On the eleventh day of February, A. D. 1913, it was ordered by the court that the time for filing proofs of claim against William S. Butler & Company, Incorporated, be allowed and time was extended to April 1, 1913.

This cause was thence continued to the March Term, A. D. 1913, when, to wit, March 24, 1913, it was ordered by the court that a motion of the National Union Bank for extension of time for proving claims against William S. Butler & Company, Incorporated, be allowed and time was extended to May 1, 1913.

At the same term, to wit, April 29, 1913, another motion of the National Union Bank for extension of time for proving claims against William S. Butler & Company, Incorporated, was allowed by the court and time was extended to June 1, 1913.

Also at the same term, to wit, May 26, 1913, the following Order of Court for Extension of Time for Proving Claims was entered:

Order of Court for Extension of Time for Proving Claims.

May 26, 1913.

DODGE, *J.:*

Ordered, petition for extension of time for proving claims
19 against William S. Butler & Company, Incorporated, allowed, and time extended to July 1, 1913.

By the Court,

CHARLES K. DARLING, *Clerk,*
By JOHN E. GILMAN, JR., *Deputy Clerk.*

This cause was thence continued to the June Term, A. D. 1913, when, to wit, July 1, 1913, the following Order of Court for Extension of Time for Proving Claims was entered:

Order of Court for Extension of Time for Proving Claims.

July 1, 1913.

DODGE, *J.:*

Ordered, petition for extension of time for proving claims against

William S. Butler & Company, Incorporated, allowed, and time extended to August 1, 1913.

By the Court,

CHARLES K. DARLING, *Clerk*,
By JOHN E. GILMAN, JR., *Deputy Clerk*.

At the same term, to wit, July 24, 1913, it was ordered by the court that the time for proving claims of creditors against William S. Butler & Company, Incorporated, be extended to September 1, 1913.

Also at the same term, to wit, August 27, 1913, it was ordered by the court that the time for proving claims against William S. Butler & Company, Incorporated, be further extended to October 1, 1913.

This cause was thence continued to the September Term, A. D. 1913, when, to wit, September 10, 1913, the following Petition of Receivers was filed:

20 *Petition of Receivers for Leave to Sell the Assets and Property of Everybody's Store, Incorporated, as a Going Concern.*

[Filed September 10, 1913.]

The receivers of Everybody's Store, Incorporated, respectfully represent that as of July 31, 1913, the statement of said corporation's assets and liabilities showed as follows:

Net cash and accounts receivable	$69,483.06
Merchandise at retail value less 33 1/3 per cent	97,030.62
Supplies at cost	942.13
Prepaid insurance	1,847.66
Total net current assets	$169,303.47
Liabilities of the corporation as of November 7, 1912, shown by the company's books	$203,085.11

That the book value as of November 7, 1912, of leases, furniture and fixtures and real estate improvements was $342,853.73.

That the claims of creditors have not been proved for the reason that this court after a hearing on March 31, 1913, has held in abeyance the receivers' petition for an order for proof of claims.

That it is manifest that the receivers cannot out of current assets satisfy the claims of creditors in full, and ask that they be discharged from their trust.

That although it appears from the receivers' report filed herein on August 20, 1913, that they have operated the store at a profit of $29,328.51, it is highly improbable that the receivers, if they should be permitted to carry on the business indefinitely, would be able by reason of profits to satisfy the indebtedness of the corporation in full.

That, in their opinion, it is expedient in order to prevent waste and depreciation of the assets of the corporation that the assets and property should be sold by order of the court forthwith, provided a price can be obtained which may meet the approval of the court and the creditors of the corporation.

That, at the present time, the merchandise on hand is at a
21 low point and the cash on hand is correspondingly high in amount. That the receivers must either reduce the cash in order to purchase merchandise in large quantities for autumn and winter sale or must carry on the business at a loss by reason of having insufficient merchandise on hand for the autumn and winter business.

That it is doubtful whether the present organization of the store can be maintained except under a permanent management, and the uncertainties of the existing situation threaten the efficiency of the organization.

That in the judgment of the receivers there is grave danger that the assets and property of the corporation will suffer waste and depreciation unless they are sold forthwith as the property of a going concern.

That the receivers are informed and believe that a majority of the creditors urge an immediate sale of the entire property of the corporation as a going concern, provided a satisfactory price can be obtained.

That the receivers are of opinion that a higher price can be obtained for said property now, in anticipation of the fall and winter trade, than at a later time.

That several responsible parties have expressed to the receivers a desire to bid for the assets of the corporation as a going concern, but the receivers have been unable to obtain from any of them definite offers for the following reasons, as the receivers believe:

Because of the pendency of the existing appeal from the dismissal of the bankruptcy petition against said corporation which until this day remained undetermined by the Circuit Court of Appeals, and

Because of a suggestion made upon the trial of said bankruptcy petition by certain creditors that the leases of the premises occupied by said corporation and certain property connected therewith did not belong to said corporation, but belonged to William S. Butler & Company, Incorporated. To determine the title to said leases, the receivers file herewith a petition for instructions, the same being entitled "Receivers' Petition for Instructions Concerning the Transfer to Everybody's Store, Incorporated, under
22 Contract dated July 12, 1912, of the Leases, Fixtures and Machinery formerly owned by William S. Butler & Company, Incorporated."

At the same time the receivers of William S. Butler & Company, Incorporated, have filed a petition praying that they may sell their right, title and interest, if any, in said leases, fixtures and machinery to such person or corporation as may become the purchaser of

the property of Everybody's Store, Incorporated, as a going concern.

Wherefore, the receivers pray,

That the court will direct the receivers either to invite bids forthwith for all the property of Everybody's Store as a going concern except the cash and the accounts receivable and will make directions as to the method of dealing with such bids, or will order the receivers to sell said assets and property of the corporation as a going concern at public auction and fix a minimum price below which said property shall not be sold, if sold at auction.

That the court will give the receivers such further directions as to it may seem proper.

That the court will issue an order of notice to all creditors of Everybody's Store, Incorporated, that they may appear and be heard concerning this petition.

CHARLES F. WEED,
MILROY H. GIBSON,
EDWARD B. WILSON,
By Their Solicitors, CHOATE, HALL & STEWART.

On the eleventh day of said September, the following Order as to Proof of Claims was entered:

Order Requiring Proof of Claims.

September 11, 1913.

DODGE, *J.*:

This cause came on to be heard upon the petition of the receivers praying that an order be made fixing a time within which the claims of creditors against the estate and property of Everybody's Store, Incorporated, in the hands of said receivers shall be
23 filed and proved. It being apparent that such order is expedient and necessary, it is ordered, adjudged and decreed that all creditors of Everybody's Store, Incorporated, present their claims made up as of November 7, 1912, verified by affidavit, to the receivers at their office at 417 Washington Street in the City of Boston on or before October 1, 1913, and that all persons or corporations whose claims are not presented in the manner and in the time herein specified shall be barred from participating in the distribution of the assets in the hands of the receivers under direction of this court unless the court for good cause shall otherwise order.

And it is further ordered, adjudged and decreed that the receivers give notice of this order by publishing an attested copy thereof in the "Boston Herald" once in each week for three successive weeks immediately following the entry of this order and by mailing to all known creditors of Everybody's Store, Incorporated, at their addresses as shown on the receiver's books, a printed copy of this order.

By the Court,

CHARLES K. DARLING, *Clerk.*

On the sixteenth day of said September, the following Decree was entered on the aforementioned petition of receivers of Everybody's Store, Incorporated, for leave to sell assets:—

Decree Upon Petition of Receivers and a Creditor for Leave to Sell Assets and Property of Everybody's Store, Incorporated.

September 16, 1913.

DODGE, *J.*:

This cause came on to be heard, a majority in interest of creditors appearing in behalf of the granting of the petitions, and it appearing that there is grave danger that the assets and property of Everybody's Store, Incorporated, will suffer waste and depreciation unless they are sold forthwith as the property of a going concern, and that it is expedient in order to prevent waste and depreciation
24 of the assets of the corporation that the assets and property should be sold by order of the court forthwith, provided a price can be obtained which may meet the approval of the court, it is ordered, adjudged and decreed:

That the receivers be and they hereby are authorized and directed to sell at public auction to the highest bidder at the receiver's office at No. 417 Washington Street in Boston, Massachusetts, on Thursday, September 25, 1913, at 3:30 o'clock in the afternoon, all and singular the property and assets of said corporation in their hands as said receivers, including cash, accounts receivable, merchandise, leaseholds, fixtures, the good-will and all other personal property and rights whatsoever, said sale to be made of the property as a whole and as a going concern subject to taxes, whether assessed directly to the corporation or for which the corporation is liable, but free from any liens except taxes which may be thereon and free from any claim in behalf of William S. Butler & Company, Incorporated, or its receivers.

The minimum price at which property may be sold is hereby fixed at $175,000. The said sale shall be subject to confirmation by decree of this court. The successful bidder shall deposit with the receivers $25,000 in cash or certified check at the time of the sale, which shall be returned if the sale shall not be confirmed.

It is further ordered, adjudged and decreed that the receivers be, and they hereby are, authorized to receive from the purchaser in part payment of the purchase price of said property any valid claim or claims against said corporation as proved and allowed at their dividend value and to credit as part payment of the said purchase price any dividend payable on said claim or claims out of the net proceeds of such sale.

And it is further ordered, adjudged and decreed that the receivers be, and they hereby are, authorized to make such other and further terms and conditions in respect to such sale not inconsistent with this decree as they may deem advisable for properly conducting the sale, and they may from time to time in their discretion adjourn said sale

by oral notice at the time and place set for said sale or at any adjournment thereof, and no other or further publication or notice need be given of any adjournment.

25 And it is further ordered, adjudged and decreed that the receivers shall give notice of such sale by publishing an attested copy of this decree once in the "Boston Herald" and once in the "New York Times" and by mailing forthwith a copy hereof to each known creditor of the corporation at his address as appears upon the receivers' books.

By the Court,

CHARLES K. DARLING, *Clerk.*

At the same term, to wit, October 1, 1913, the following Proofs of Claim were filed with the receiver:—

Proof of Claim of Robert H. Gardiner, Trustee, Against William S. Butler & Company, Incorporated.

[Filed October 1, 1913.]

At Boston, in the County of Suffolk and Commonwealth of Massachusetts, on the first day of October, 1913, came Robert H. Gardiner, trustee under an agreement and declaration of trust establishing the Perry Real Estate —, dated October 1, 1904, recorded with Suffolk County Deeds, book 2995, page 465, and made oath and said that, to the best of his knowledge and belief, and as estimated as in account annexed set forth, the said William S. Butler & Company, Incorporated, was on the seventh day of November, 1912, justly and truly indebted to said Gardiner, trustee as aforesaid, in the sum of one hundred seven thousand eight hundred ninety dollars and 14/100 ($107,890.14); that the consideration of said debt is as follows:—

For rent and other payments due under and on account of a certain lease of premises numbered 8 Bosworth Street, 15-20 Chapman Place, and 33-37 Province Street, Boston, and as damages on account of the breach of said lease and the abandonment thereof by the Receivers of said Wm. S. Butler & Co., Inc., all as more particularly appears by an account hereto annexed marked "A." Said lease was for a term of nine years and four months from January 1, 1911, said Gardiner as Trustee was Lessor, said Wm. S. Butler & Co., Inc., was Lessee, and said lease was assigned by the Lessee to Everybody's Store, Inc., with the consent of the Lessor. That no part of

26 said debt has been paid, that there are no set-offs or counter claims to the same, and that no note has been received for such account and no judgment rendered thereon.

ROBERT H. GARDINER,
Trustee of the Perry Real Estate Trust.

Subscribed and sworn to before me this first day of October, 1913.

WILLIAM H. STONE,
Justice of the Peace.

A.

Rent due under lease dated December 19, 1910, from Robert H. Gardiner as Trustee of the Perry Real Estate Trust to William S. Butler & Company Incorporated of premises numbered 8 Bosworth Street, 15-20 Chapman Place and 33-37 Province Street, as follows:

Rent due Dec.	1, 1912,	for month of	November,	$916.67			
" " Jan.	1, 1913,	" "	December..	916.67			
" " Feb.	1, 1913,	" "	January..	916.67			
" " Mar.	1, 1913,	" "	February.	916.67			
" " April	1, 1913,	" "	March.....	916.67			
" " May	1, 1913,	" "	April	916.67			
" " June	1, 1913,	" "	May	916.67			
" " July	1, 1913,	" "	June	916.67			
" " Aug.	1, 1913,	" "	July	916.67			
" " Sept.	1, 1913,	" "	August ..	916.67			
" " Oct.	1, 1913,	" "	September	916.67			
							$10,083.37
Less credits, collections, etc.							2,235.83
Claim to Oct. 1, 1913							$7,847.54

Credit the following collections less payments:

Collections.

Nov. 22, 1912.	Rec'd from C. F. Weed et al. Receivers..	458.34		
Dec. 3, 1912.	" " " " " " ..	458.33		
Jan. 17, 1913.	" " " " " " ..	672.23		
	" " " " " " ..			
	(a/c water),	43.84		
27				
Jan. 6, 1913.	C. Zaya & J. Lopresti, rent for Jan. for basement	60.		
	Rockwood McIntyre & Co., Dec. 31, 1912, to Jan. 3, 1913	60.		
Feb. 1, "	G. Zaya & J. Lopresti, rent for Feb.	60.		
Mar. 1, "	" " " " " Mar.	60.		
17, "	Henry Penn, March 17 to 24	100.		
Apr. 1, "	G. Zaya & J. Lopresti, rent for April	60.		
May 1, "	" " " " " May	60.		
June 2, "	" " " " " June	60.		
July 1, "	" " " " " July	60.		
Aug. 1, "	" " " " " Aug.	60.		
Sept. 2, "	" " " " " Sept.	60.		
				$2,332.74

Payments.

Jan. 15, 1913.	City of Boston, water from Sept. 4, 1912, to Jan. 3, 1913	53.60	
Jan. 23. "	Wm. Hall & Co., repairs on locks	2.75	
31, "	Henry T. Reass, wages Jan. 3 & 4 and padlock	3.35	
Feb. 17, "	R. P. Slattery & Co., shutting off water...	12.46	
Feb. 21, "	George White for shovelling snow	.50	
Apr. 7, "	City of Boston, water to March 20	2.80	
16, "	R. P. Slattery & Co., cleaning up rubbish..	21.45	
			96.91
			$2,235.83

Estimated Claim from October 1st, 1913, to May 1st, 1920:		
Rents from October 1, 1913, through April 30, 1920	$77,416.69	
Estimated Other Payments:		
Taxes, 1913-1919, inclusive, estimated on basis of 1913 taxes	29,050.00	
		$106,466.69
Estimated Collections from October 1st, 1913, through April 30, 1920:		
Estimated rents of the premises based on average net rentals for the past five years		6,424.09
Estimated amount of Lessor's claim, exclusive of interest from October 1st, 1913, through April 30, 1920		$100,042.60
Claim to October 1st, 1913		7,847.54
Total amount of Lessor's claim, exclusive of interest		$107,890.14

Proof of Claim of Robert H. Gardiner, Trustee, Against Everybody's Store, Incorporated.

[Filed October 1, 1913.]

At Boston, in the County of Suffolk and Commonwealth of Massachusetts, on the first day of October, 1913, came Robert H. Gardiner, trustee under an agreement and declaration of trust establishing the Perry Real Estate — dated October 1, 1904, recorded with Suffolk County Deeds, book 2995, page 465, and made oath and said that, to the best of his knowledge and belief, and as estimated in account annexed set forth, the said Everybody's Store, Incorporated, was, on the seventh day of November, 1912, justly and truly indebted to said Gardiner, trustee as aforesaid, in the sum of one hundred seven thousand eight hundred ninety dollars and 14/100 ($107,890.14); that the consideration of said debt is as follows:—

For rent and other payments due under and on account of a certain lease of premises numbered 8 Bosworth Street, 15-20 Chapman Place, and 33-37 Province Street, Boston, and as damages on acocunt of the breach of said lease and the abandonment thereof by the receivers of said Everybody's Store, all as more particularly appears by an account hereto annexed marked "A." Said lease was for a term of nine years and four months from January 1, 1911, said Gardiner as Trustee was Lessor, Wm. S. Butler & Co., Inc., was Lessee, and said lease was assigned by the Lessee to Everybody's Store, Inc., with the consent of the Lessor.

That no part of said debt has been paid, that there are no set-offs or counter claims to the same, and that no note has been received for such account and no judgment rendered thereon.

ROBERT H. GARDINER,
Trustee of the Perry Real Estate Trust.

29 Subscribed and sworn to before me this first day of October, 1913.

WILLIAM H. STONE,
Justice of the Peace.

A.

Rent due under lease dated December 19, 1910, from Robert H. Gardiner as Trustee of the Perry Real Estate Trust to William S. Butler & Company Incorporated of premises numbered 8 Bosworth Street, 15-20 Chapman Place and 33-37 Province Street, as follows:

Rent due Dec.	1, 1912,	for month of	November.	$916.67			
" " Jan.	1, 1913,	" "	December.	916.67			
" " Feb.	1, 1913,	" "	January .	916.67			
" " Mar.	1, 1913,	" "	February .	916.67			
" " April	1, 1913,	" "	March ...	916.67			
" " May	1, 1913,	" "	April	916.67			
" " June	1, 1913,	" "	May	916.67			
" " July	1, 1913,	" "	June	916.67			
" " Aug.	1, 1913,	" "	July	916.67			
" " Sept.	1, 1913,	" "	August ..	916.67			
" " Oct.	1, 1913,	" "	September	916.67			
							$10,083.37
Less credits, collections, etc.							2,235.83
Claim to October 1, 1913							$7,847.54

Credit the following collections less payments:

Collections.

Nov.	22, 1912.	Rec'd from C. F. Weed et al. Receivers..		458.34
Dec.	3, 1912.	" " " " " ..		458.33
Jan.	17, 1913.	" " " " " ..		672.25
		" " " " " ..		
			(a/c water),	43.84
Jan.	6, 1913.	C. Zaya & J. Lopresti, rent for Jan. for basement		60.
		Rockwood McIntyre & Co., Dec. 31, 1912, to Jan. 3, 1913.....		60.

30

Feb.	1, "	G. Zaya & J. Lopresti, rent for Feb.....		60.
Mar.	1, "	" " " " " Mar.		60.
	17, "	Henry Penn, March 17 to 24.....		100.
Apr.	1, "	G. Zaya & J. Lopresti, rent for April		60.
May	1, "	" " " " " May		60.
June	2, "	" " " " " June		60.
July	1, "	" " " " " July		60.
Aug.	1, "	" " " " " Aug.		60.
Sept.	2, "	" " " " " Sept.		60.
				$2,332.74

Payments.

Jan. 15, 1913.		City of Boston, water from Sept. 4, 1912, to Jan. 3, 1913	53.60	
Jan. 23,	"	Wm. Hall & Co., repairs on locks	2.75	
31,	"	Henry T. Reass, wages Jan. 3 & 4 and padlock	3.35	
Feb. 17,	"	R. P. Slattery & Co., shutting off water	12.46	
Feb. 21,	"	George White for shovelling snow	.50	
Apr. 7,	"	City of Boston, water to March 20	2.80	
Nov. 16,	"	R. P. Slattery & Co., cleaning up rubbish	21.45	
				96.91
				$2,235.83

Estimated Claim form October 1st, 1913, to May 1st, 1920:

Rents from October 1, 1913, through April 30, 1920	$77,416.69	
Estimated Other Payments:		
Taxes, 1913-1919, inclusive, estimated on basis of 1913 taxes	29,050.00	
		$106,466.69
Estimated Collections from October 1st, 1913, through April 30, 1920:		
Estimated rents of the premises based on average net rentals for past five years		6,424.09
Estimated amount of Lessor's claim, exclusive of interest from October 1st, 1913, through April 30, 1920		$100,042.60
31		
Claim to October 1st, 1913		7,847.54
Total amount of Lessor's claim, exclusive of interest		$107,890.14

At the same term, to wit, December 1, 1913, the following Motions to Amend Proofs of Claims were filed and allowed:—

Motion of Robert H. Gardiner to Amend Proof of Claim Against William S. Butler & Company, Incorporated.

[Filed and Allowed December 1, 1913.]

And now comes Robert H. Gardiner, trustee of the Perry Real Estate Trust, and moves to amend his proof of claim heretofore filed against William S. Butler & Company, Incorporated, by filing in addition to the said proof of claim already filed, the proof hereto annexed.

By His Attorneys, WARREN, GARFIELD, WHITESIDE & LAMSON.

In the District Court of the United States for the District of Massachusetts.

Equity. No. 396.

In the Matter of WILLIAM S. BUTLER & COMPANY, INCORPORATED.

CLAIM

v.

WILLIAM S. BUTLER & COMPANY, INCORPORATED.

At Boston, in the County of Suffolk and Commonwealth of Massachusetts, on the first day of December, 1913, came Robert H. Gardiner, trustee under an agreement and declaration of trust, establishing the Perry Real Estate Trust, dated October 1, 1904, recorded with Suffolk County Deeds, book 2995, page 465, and made oath and said that the said William S. Butler & Company, Incorporated, is, to the best of his knowledge and belief, and as estimated in account hereto annexed set forth, just and truly indebted to said Gardiner, trustee as aforesaid, in addition to proof of claim heretofore filed against said William S. Butler & Company, Incorporated, in the sum of nine thousand six hundred sixty-six and sixty-six one-hundredths (9666.66) dollars;

32 That the consideration of said debt is as follows:—

For rent and other payments due under and on account of a certain lease from Albert C. Russell to William S. Butler & Company, Incorporated, of premises corner of Chapman Place and Bosworth Street, dated April 10, 1911, and damages on account of breach of said lease and abandonment thereof by the receivers of said William S. Butler & Company, Incorporated, from June 1, 1913, to the date set in said lease for the termination of the term thereof, namely, April 1, 1921, all as more particularly appears by an account hereto annexed marked "A." The premises so leased were sold by said Russell to said Gardiner, trustee, as aforesaid, with the right to all rentals due or to become due after May 31, 1913.

That no part of said debt has been paid, and that there are no set-offs or counter-claims to the same, and that no note has been received for such account, and no judgment rendered thereon.

ROBERT H. GARDINER,
Trustee of the Perry Real Estate Trust.

Subscribed and sworn to before me, this first day of December, 1913.

JOHN E. WILLIAMS.

A.

Estimated claim from June 1st, 1913, through March 31st, 1921:	
Rents at $2,000 per year	$15,666.66
Estimated collections from June 1st, 1913, through March 31st, 1921:	
Estimated rents of premises based on average net rentals actually collected for past five years, namely from July 8, 1908, through July 16, 1913	6,000.00
Total amount of claim exclusive of interest	$9,666.66

December 1, 1913.

DODGE, *J.*:

Motion allowed and proof of claim may be amended accordingly.

Attest:

CHARLES K. DARLING, *Clerk.*

33 *Motion of Robert H. Gardiner to Amend Proof of Claim Against Everybody's Store, Incorporated.*

[Filed and Allowed December 1, 1913.]

And now comes Robert H. Gardiner, trustee of the Perry Real Estate Trust, and moves to amend his proof of claim heretofore filed against Everybody's Store, Incorporated, by filing in addition to the said proof of claim already filed the proof hereto annexed.

By his Attorneys, WARREN, GARFIELD, WHITESIDE & LAMSON.

In the District Court of the United States for the District of Massachusetts.

Equity. No. 396.

In the Matter of WILLIAM S. BUTLER & COMPANY, INCORPORATED.

CLAIM

v.

EVERYBODY'S STORE, INCORPORATED.

At Boston, in the County of Suffolk and Commonwealth of Massachusetts, on the first day of December, 1913, came Robert H. Gardiner, trustee under an agreement and declaration of trust, establishing the Perry Real Estate Trust, dated October 1, 1904, recorded with Suffolk County Deeds, book 2995, page 465, and made oath

and said that the said William S. Butler & Company, Incorporated, is, to the best of his knowledge and belief, and as estimated in account hereto annexed set forth, justly and truly indebted to said Gardiner, trustee as aforesaid, in addition to proof of claim heretofore filed against said Everybody's Store, Incorporated, in the sum of nine thousand six hundred sixty-six and sixty-six one-hundredths (9666.66) dollars;

That the consideration of said debt is as follows:—

For rent and other payments due under and on account of a certain lease from Albert C. Russell to William S. Butler & Company, Incorporated, of premises corner of Chapman Place and Bosworth Street, dated April 10, 1911, and damages on account of breach of said lease and abandonment thereof by the receivers of said William S. Butler & Company, Incorporated, from June 1st, 1913, to the date set in said lease for the termination of the term thereof, namely, April 1st, 1921, all as more particularly appears by an account hereto annexed marked "A." The premises so leased were
34 sold by said Russell to said Gardiner, trustee as aforesaid, with the right to all rentals due or to become due after May 1, 1913.

That no part of said debt has been paid, and that there are no set-offs or counter-claims to the same, and that no note has been received for such account, and no judgment rendered thereon.

ROBERT H. GARDINER,
Trustee of the Perry Real Estate Trust.

Subscribed and sworn to before me, this first day of December, 1913.

JOHN E. WILLIAMS.

A.

Estimated claim from June 1st, 1913, through March 31st, 1921:	
Rents at $2,000 per year	$15,666.66
Estimated collections from June 1st, 1913, through March 31st, 1921:	
Estimated rents of premises based on average net rentals actually collected for past five years, namely from July 8, 1908, through July 16, 1913	6,000.00
Total amount of claim exclusive of interest	$9,666.66

December 1, 1913.

DODGE, *J.*:

Motion allowed and proof of claim may be amended accordingly.

Attest:

CHARLES K. DARLING, *Clerk.*

Exhibit A.

Copy of Lease from Albert C. Russell to William S. Butler & Company, Incorporated.

[Filed in Clerk's Office December 17, 1914.]

This indenture made the tenth day of April, 1911, between Albert C. Russell of Boston in the County of Suffolk and Common-
35 wealth of Massachusetts and William S. Butler & Company, Inc. a corporation duly established by law and having its usual place of business in said Boston, Witnesseth, that in consideration of the covenants herein contained on the part of the William S. Butler & Co. Inc. and its representatives and successors to be kept and performed, the said A. C. Russell does hereby lease unto the said Wm. S. Butler & Co. Inc. a lot of land with the building thereon situate at the corner of Chapman Place and Bosworth Street, the said premises being subject to whatever right of way or other easement there may be on the northeasterly bound thereof.

To have and to hold the said premises unto the said Wm. S. Butler & Co. Inc. and its representatives and successors from the first day of April, 1911, during the term of ten years then next ensuing, the said premises to be delivered on the day of the date hereof, free of all tenants except such tenancies as are terminated on one month's notice, which notice the lessee is hereby authorized to give, and which notice shall, in the case of each tenant, expire on a rent day of his tenancy.

And the said lessee covenants to pay rent during the full term of this lease, at the rate of two thousand dollars per year, in twelve equal installments during each year of said term, said installment- to be paid on the first day of each month for the month immediately preceding, the first payment to be made on the first day of May, 1911. And the said lessee, during the continuance of the said term, covenants to maintain the demised building and the sidewalks and rights of way appurtenant thereto in proper and lawful condition and in such repair as they are now in, reasonable use and wear and damage by accidental fire and other inevitable accidents only excepted, and to hold the lessor harmless from any damage or loss occasioned by its neglect so to do, or its occupation and use of the said premises, and further covenants to pay all water rates for the use of water in the said premises, all plate glass insurance, and generally all charges incidental to its control and management of the said premises; the said lessor to pay all taxes and assessments and insurance other than as aforesaid. The said lessee covenants with the said lessor that it will not assign this lease or underlet any
36 part thereof for the carrying on of any business which will increase public assessments and insurance rates on the said premises without the assent in writing of the lessor.

It is further agreed that the premises shall by the lessor be kept fully insured and the insurance shall be made payable in case of loss during said term to the lessee, and that in case the premises or

any part thereof shall be destroyed or damaged by fire or otherwise, the lessee shall apply the amount received from insurance to the reconstruction or restoration thereof.

And the said lessor covenants with the said lessee that it paying the rent as aforesaid and performing the covenants herein contained on its part to be paid and performed, shall peaceably hold and enjoy the said demised premises, without hindrance or interruption by the lessor or any person or persons whomsoever, but upon failure by the lessee to perform or observe the covenants herein by it to be performed or observed, or in case of the lessee's bankruptcy or insolvency, the lessor may thereupon enter the demised premises and repossess the same as of his former estate, without prejudice to such other remedies as he may have against the lessee.

In witness whereof, we the said Albert C. Russell and the Wm. S. Butler & Co. Inc. by its Assistant Treasurer duly authorized, have hereunto set *their* signatures and respective seals this tenth day of April, 1911.

A. C. RUSSELL. [SEAL.]
WM. S. BUTLER & CO., INC.,
[CORPORATE SEAL.] By BRANT W. CARRON,
Assistant Treasurer.

(Acknowledgment by Albert C. Russell.)

Lease from Robert H. Gardiner, Trustee, to William S. Butler & Company, Incorporated.

[Filed in Clerk's Office December 17, 1914.]

This indenture, made the nineteenth day of December in the year nineteen hundred and ten between Robert H. Gardiner, Trustee of the Perry Real Estate Trust under Declaration of Trust dated October
1, 1904, and recorded with Suffolk Deeds, (hereinafter
37 called the Lessor) and William S. Butler & Company, Incorporated, a corporation duly organized and existing under the laws of the State of Massachusetts (hereinafter called the Lessee),

Witnesseth, that the Lessor doth hereby lease unto the Lessee the following premises in Boston, Massachusetts, (hereinafter called the demised premises), to wit:—the lot of land with the brick building thereon situated and numbered eight (8) Bosworth Street, fifteen to twenty (15-20) Chapman Place and thirty-three to thirty-seven (33-37) Province Street, including such rights as the lessor may have in a passage leading from the demised premises through or over the rear portion of the estate No. 7 Bosworth Street to said Chapman Place.

To Have and to Hold the demised premises unto the Lessee for the term of nine (9) years and Four (4) months beginning with noon of the first day of January in the year nineteen hundred and eleven.

Yielding and Paying therefor in gold coin of the present standard of weight and fineness at the office of the Lessor, the yearly rent of eleven thousand (11,000) dollars during the first four (4) years and

four (4) months of the term, and the yearly rent of twelve thousand (12,000) dollars during the last five (5) years of the term, in equal monthly payments of nine hundred sixteen and 67/100 (916.67) dollars during the first four (4) years and four (4) months of the term, and in equal monthly payments of one thousand (1000) dollars during the last five (5) years of the term, on the first day of every month for the month ending with the day previous, the first payment to be made on the first day of February 1911; and also at the expiration or other termination of this lease a proportionate part of the said rent for any part of a month then unexpired.

The Lessee covenants to pay to the Lessor the said rent as aforesaid and to pay all charges for water, and six (6) per centum per annum of any betterments assessed during the term hereof in equal instalments with the rent; and the Lessee covenants to keep the demised premises, its sidewalks and approaches, and all machinery, elevators, boilers, heating and power apparatus, shaftways, electric wires,
38 pipes, drains, coal-holes, hatchways, glass, plumbing, and all other parts of the demised premises repaired, whole, and of the same kind, quality, and description, and in such good repair, order, and condition, as the same are at the beginning of or may be put in during the term, damage by accidental fire or other unavoidable casualty only excepted, acknowledging that the aforesaid now are in good repair, order, and condition, and to keep all of the foregoing thoroughly inspected, provided with all safety guards and appliances, and in condition to comply from time to time with all laws, ordinances, rules, and regulations; and to save the Lessor harmless and indemnified from all loss, damage, liability, or expense incurred, suffered or claimed by reason of the neglect or use of, or accident from any of the foregoing, or from gas, water, electricity, or other agency, or from snow or ice, or by reason of any injury, loss, or damage to any person or property upon the demised premises, or the streets, alleys, or sidewalks adjacent thereto; and to be answerable for all nuisances caused or suffered on, and to remove snow and ice from the demised premises, its sidewalks and approaches, and not to suffer or permit any strip or waste, or overloading, damaging, or defacing of the demised premises, or use thereof for the storage or sale of intoxicating liquors, or any trade or occupation to be carried on, or use made thereof which shall be unlawful, noisy, or offensive, or contrary to any law, ordinance, rule, or regulation, or injurious to any person or property, or such as to increase the danger of fire or affect or make void any insurance of the demised premises or of anything therein against fire or other liability, or which may render any increased or extra premium payable for such insurance.

And the Lessee covenants not to assign this lease or underlet the whole of the demised premises, or permit any hole to be drilled in the outside of said building, or any placard, sign, awning, or the like, to be placed thereon, or any addition or alteration to be made to or upon the demised premises, without first obtaining in each of the foregoing instances, on each occasion, the consent in writing of the Lessor.

The Lessor may during the Lessee's occupation at any time

enter to view the demised premises, or to make repairs if the Lessor should elect so to do, or to show the demised premises to others, or to remove placards, signs, awnings, and the like, not expressly consented to, without being held responsible therefor, and may three months next preceding the expiration of the term place notices for letting or selling on the demised premises.

And the Lessee covenants at the expiration or other termination of this lease to remove all goods and effects from the demised premises not the property of the Lessor and to yield up to the Lessor the demised premises and all erections and additions made to or upon the same in good repair, order, and condition in all respects, reasonable wearing and use thereof and damage by accidental fire or other unavoidable casualty only excepted.

This lease is given and accepted subject to all of the terms and *and* provisions of each of the following leases:

1. A lease of the fourth, fifth and sixth stories of said building to Henry M. Robinson & Company for a term beginning April 30, 1910, and ending April 30, 1920.

2. A lease of a certain portion of the basement of said building to Frank Saia for a term beginning October 1, 1908, and ending September 30, 1914, and duly assigned to Gaspare Zaya and Joseph Lopresti.

All the foregoing covenants of the Lessee shall be in force without demand or notice during said term and for such further time as the Lessee or any person or persons claiming under the Lessee shall hold the demised premises.

This lease is made on condition that in case the whole or a part of the demised premises be destroyed or damaged by fire during the periods and to the extent stipulated in the following table, or be taken, damaged or destroyed by public authority after the execution and before the termination hereof, then this lease may, at the election of the lessor within a reasonable time, be terminated, provided that, if the same be not so terminated, and if the demised premises or any part thereof are rendered unfit for use and occupation, a just and proportionate part of the rent, according to the nature and extent of the injury to the demised premises, shall be suspended or abated until the premises shall have been put in as good condition for use and occupation as at the time of such taking, damage or destruction:

In case of damage during the first year of the term to the extent of $20,000.

In case of damage during the second year of the term to the extent of $18,000.

In case of damage during the third year of the term to the extent of $16,000.

In case of damage during the fourth year of the term to the extent of $14,000.

In case of damage during the fifth year of the term to the extent of $12,000.

In case of damage during the sixth year of the term to the extent of $10,000.

In case of damage during the seventh year of the term to the extent of $8,000.

In case of damage during the eighth year of the term to the extent of $6,000.

In case of damage during the last year and four months of the term to the extent of $4,000.

This lease is made on condition also that if the Lessee shall neglect or fail to perform or observe any of the covenants herein contained on the Lessee's part to be performed or observed, or if the estate hereby created shall be taken on execution or other process of law, or if the Lessee shall petition to be or be declared bankrupt or insolvent according to law, or if a receiver, guardian, conservator, or other similar officer shall be appointed to take charge of any part of the property of, or to wind up the affairs of the Lessee, or if any assignment shall be made of the Lessee's property for the benefit of creditors, then, and in either of the said cases, the Lessor lawfully may, immediately, or at any time thereafter, and without demand or notice, enter into and upon the demised premises or any part thereof in the name of the whole, and repossess the same as of his former estate, and expel the Lessee and those claiming through or
41 under him and remove the effects of both or either (forcibly, if necessary) without being deemed guilty of any manner of trespass and without prejudice to any remedies for arrears of rent or preceding breach of covenant, and upon entry as aforesaid the Lessee's estate shall end. And the Lessee covenants that in case of such termination, or of termination under the provisions of statute by reason of default on the part of the Lessee, the Lessee will, at the election of the Lessor (which election may be made or changed at any time) either (*a*) pay to the Lessor sums equal to the rent and other payments herein named at the same times and in the same instalments or, if the premises shall have been relet sums equal to the difference between the aforesaid and the sums actually received by the Lessor in proportionate instalments, as liquidated damages for so much of the unexpired term as is represented by such instalments, or (*b*) pay to the Lessor, as damages, a sum which at the time of such termination or at the time to which instalments of liquidated damages shall have been paid represents the difference between the rental value of the premises and the rent and other payments herein named for the residue of the term, or (*c*) indemnify the Lessor against loss of rent and other payments herein named from the time of such termination or from the time to which instalments of liquidated damages shall have been paid, during the residue of the term.

Any assent to any breach of, or any waiver of any of the Lessee's covenants by the Lessor, whether express or implied, shall not be construed to be a waiver either of such covenants or of any subsequent breach thereof; and any notice from the Lessor to the Lessee relating to the demised premises or the occupancy thereof shall be deemed duly served if left at the demised premises addressed to the Lessee.

Where the context so admits, the term "Lessor" shall include agents, heirs, successors, and assigns, and the term "Lessee" shall

include legal representatives, successors, and assigns. If more than one Lessor or Lessee are parties to this indenture, singular context shall be construed to be plural wherever necessary, and the covenants of the Lessee shall be the joint and several obligations to each
42 party signing as Lessee, and, when the Lessees are partners, shall be the obligations of the firm and of the individual members thereof.

In witness whereof the said Robert H. Gardiner has hereto and to a duplicate hereof set his hand and seal, and the said William S. Butler & Company, Incorporated, by William E. Butler its Pres. & Treas. thereto authorized, has hereto and to a duplicate hereof set its hand and corporate seal the day and year first above written.

[SEAL.] WM. S. BUTLER & CO., INC.,
By W. E. BUTLER, *P's't & Treas.*
ROBERT H. GARDINER, *Trustee.* [SEAL.]

BOSTON, Dec. 19, 1910.

Messrs. William S. Butler & Company, Tremont St., Boston.

GENTLEMEN: Having reference to lease dated December 19, 1910, of the entire building No. 8 Bosworth Street, No. 15-20 Chapman Place, No. 33-37 Province Street, which you have taken from me as Trustee of the Perry Real Estate Trust, I hereby consent to your placing any reasonable placards, signs or awnings on the outside of the building for the proper advertisement of your business, and to the removal of large central staircase and the construction of a staircase from 2nd to 3rd floor, all of the work to be performed in a first class workmanlike manner in accordance with the requirements of the public authorities and the Boston Board of Fire Underwriters.

Yours very truly,

ROBERT H. GARDINER.

At a meeting of the Directors of William S. Butler & Company, Incorporated, duly notified and held at 90 Tremont St., Boston, on the nineteenth day of December, 1910, the within lease having been read and considered, it was

Voted,—"That the Treasurer is hereby authorized in the name and behalf of the Corporation to execute and deliver the lease which has just been read.

Attest:
N. E. ANDARTON, *Clerk.*

43 Oct. 1, 1913, at 12.24 p. m. I entered upon the premises described in the within lease for breach of the condition of said lease.

ROBERT H. GARDINER, *Trustee.*

In presence of
WILLIAM S. SCHMELTZ.

Copy of Assignment of Leases from William S. Butler & Company, Incorporated, to Everybody's Store, Incorporated.

[Filed in Clerk's Office December 17, 1914.]

Suffolk Registry of Deeds.

Wm. S. Butler & Co., Inc., to Everybody's Store, Inc., Libro 3687, Page 390.

This Indenture made this thirtieth day of September, 1912, by and between Wm. S. Butler & Co. Inc. a Massachusetts corporation (hereinafter called "Butler's" which expression shall include its successors and assigns) and Everybody's Store Inc. a Massachusetts corporation (hereinafter called "Everybody's" which expression shall include its successors and assigns) witnesseth that Whereas Butler's is the assignee from William E. Butler by instrument dated January 2, 1911, herein incorporated by reference, of a certain lease dated March 31, 1904, herein incorporated by reference, from Francis W. Brewer, Augusta E. Brewer, Wilmon W. Blackmar, Helen R. Blackmar and Fannie E. Brewer, individually and as trustees, to said William E. Butler of premises numbered 90, 92 and 94 on Tremont Street and 2 on Bosworth Street in Boston and Whereas Butler's is the assignee from William E. Butler by instrument dated January 2, 1911, herein incorporated by reference of a certain lease dated February 1, 1904, herein incorporated by reference, from Frank W. Reynolds, surviving trustee under the will of Henry V. Ward, Caroline E. Ward, Anita S. Ward, Marion De C. Ward, and Robert De C. Ward to said William E. Butler of premises at the corner of Bosworth and Tremont Streets in said Boston and Whereas Butler's is the lessee under a certain lease dated April 10, 1911, herein
44 incorporated by reference, from Albert C. Russell of premises at the corner of Chapman Place and Bosworth Street in said Boston and Whereas Butler's is the lessee under a certain lease dated December 19, 1910, herein incorporated by reference, from Robert H. Gardiner, Trustee of the Perry Real Estate Trust, of premises numbered 8 on Bosworth Street, 15-20 on Chapman Place, 33-37 on Providence Street in said Boston and whereas Butler's is the owner by assignment dated December 19, 1910, herein incorporated by reference, from said Robert H. Gardiner, Trustee as aforesaid of a lease dated October 1, 1908, herein incorporated by reference given by said Robert Gardiner Trustee to Francesco Saia of part of said premises numbered 33-37 on Province Street in said Boston and Whereas Butler's was the lessee under a certain lease dated August 1, 1905, herein incorporated by reference, from Tremont Temple Baptist Church of rooms numbered 200 and 201 Tremont Temple, Boston and under a certain other lease dated in error January 1, 1997, meaning January 1, 1907, herein incorporated by reference, from said Tremont Temple Baptist Church of rooms numbered 300, 301, 302 and 303 Tremont Temple and Whereas Butler's is the assignee from William E. Butler by instrument of even date

herewith, herein incorporated by reference, of a certain lease dated July 20, 1911, from Exra Palmer Zaidee Burgess and Edward H. Palmer to said William E. Butler of premises numbered 3 on Bosworth Street in Boston Now Therefore in consideration of one dollar moving interchangeably between the parties hereto,—the receipt whereof by each is hereby acknowledged, and of the covenants herein contained the parties hereto agree as follows:

I. Butler's hereby assigns, transfers and sets over to Everybody's the above mentioned leases, the premises thereby remised, and all its right, title and interest in and under the same.

II. Everybody's covenants with Butler's that it will pay the rent and make the other payments which may hereby become due according to the terms of said leases hereby assigned and will perform all the covenants, agreements and stipulations in said leases contained which are to be performed by the lessees respectively (saving and excepting said lease dated October 1, 1908, from said
45 Gardiner Trustee to said Saia) and will save Butler's and all over lessees in said leases named harmless and indemnified from all loss, cost, damage or expense hereafter arising or accruing under or by virtue of said leases or any of them.

In Witness Whereof the parties hereto have hereunto and to a duplicate hereof set their respective hands and corporate seals the day and year first above written.

WM. S. BUTLER & COMPANY, INC.,
By WILLIAM E. BUTLER,
President and Treasurer.

[And the Corporate Seal.]

EVERYBODY'S STORE, INC.,
By RALPH ALBERTSON, *President.*
WILLIAM E. BUTLER, *Treasurer.*

[And the Corporate Seal.]

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

BOSTON, Oct. 17, 1912.

Then personally appeared William E. Butler, and acknowledged the foregoing instrument to be the free act and deed of Wm. S. Butler & Co., Inc., before me,

CHARLES F. WEED,
Notary Public.

I, Albert C. Russell, the lessor named in the above mentioned lease dated April 10, 1911, to Wm. S. Butler & Co. Inc. of premises at the corner of Chapman Place and Bosworth Street hereby consent to the foregoing assignment thereof to Everybody's Store Inc. provided however that this assent shall not operate to release Butler's from any obligation under any of the covenants in the said lease contained. September 30, 1912.

ALBERT C. RUSSELL.

I, Robert H. Gardiner Trustee of the Perry Real Estate Trust under Declaration of Trust dated October 1, 1904, and recorded with Suffolk — of Deeds, the lessor named in the above mentioned lease dated December 19, 1910, to Wm. S. Butler & Company Inc. of premises numbered 8 on Bosworth Street, 15-20 on Chapman Place and 33-37 Province Street hereby consent to the foregoing assignment thereof to Everybody's Store, Inc. September 30, 1912.

ROBERT H. GARDINER, *Trustee.*

Tremont Temple Baptist Church, the lessor named in the two above mentioned leases dated respectively August 1, 1905, and in error January, 1997, meaning January 1, 1907, to Wm. S.
46 Butler & Co. Inc. respectively of rooms numbered 200 and 201 Tremont Temple and of rooms numbered 300, 301, 302 and 303 Tremont Temple hereby consents to the foregoing assignment thereof to Everybody's Store Inc. September 30, 1912.

TREMONT TEMPLE BAPTIST CHURCH,
Per F. F. McLEOD, *Treas.*
TREMONT TEMPLE BAPTIST CHURCH,
Per LEONARD H. RHOADES, *Chr. Tem. Com.*

November 15, 1912.—At Ten O'clock and Nineteen Minutes a. m. Received, Entered and Examined.

A true copy from the Records of Deeds for the County of Suffolk, Libro 3687, Page 390.

Attest:

WM. T. A. FITZGERALD, *Register.*

This cause was thence continued to the December Term, A. D. 1913, when, to wit, December 15, 1913, the following Decree upon Disputed Claims was entered:—

Decree upon Disputed Claims in the Matter of William S. Butler & Company, Incorporated.

December 15, 1913.

DODGE, *J.:*

This cause came on to be heard on November 25, 1913, and thereafter by continuance on December 13, 1913, upon the receivers' petition relative to allowance and disallowance of claims and their several supplemental reports thereon, and thereupon it appearing that due notice thereof has been given to creditors as directed by the court, and that the claims set forth in Exhibit C hereto annexed are in dispute between the several claimants and the receivers, and that exceptional conditions require a reference for speedy determination of the issue, it is ordered that said claims be referred to Franklin T. Hammond, Esq., as special master to hear the parties and their evidence and report to the court thereon.

By the Court,

CHARLES K. DARLING, *Clerk.*

47 EXHIBIT C.

Wm. S. Butler & Company, Inc.

Name.	Address.	Amount.
Biberman Bros.	240 Market St. Philadelphia, Pa.	$45.00
Bondy, Hugo.	225 Fifth Ave., N. Y. City.	966.81
Buskey, Geo.	Winthrop, Mass.	425.00
Cotting, Chas. E. & Adams, C. F.	11 Pemberton Sq., Boston, Mass.	2,328.51
Dennison Mfg. Co.	South Framingham, Mass.	85.73
Ferguson, Robert	18 Mercer St., N. Y. City.	12.13
Gagnon, James A.	37 Gardner Ave., Lowell, Mass.	6,805.57
Hamilton Brown Shoe Co.	604 Atlantic Ave., Boston, Mass	164.00
Holophane Works of General Electric Co.	Cleveland, Ohio.	172.93
Isaacson, J. & Co.	159-162 W. 25th St., N. Y. City	37.50
Jennings, Isabella.	7901 Ridge Boulevard, Brooklyn, N. Y.	2,896.58
Jewett, John N.	West Newton, Mass.	3,168.51
Kaminsky, I.	15 E. 26th St., New York City	83.00
Kuplun & Davis.	133-141 W. 21st St., N. Y. City	81.00
Keiser, James R., Inc.	10 W. 20th St., N. Y. City.	80.39
Lahm & Dentz.	48-52 W. 35th St., N. Y. City	351.25
Lazarus Bros.	38 W. 28th St., N. Y. City.	111.50
Lurie, Gus & Co.	37 W. 26th St., N. Y. City.	145.20
Le Roy Shirt Co.	513 Broadway, N. Y. City.	143.92
Lamson Co., The.	161 Devonshire St., Boston.	1,123.20
Lamson Co., The.	161 Devonshire St., Boston.	8,381.46
McLean, Isaac Sons Co.	Dorchester St., So. Boston, Mass.	27,716.91
Murphy, Agnes.	Boston, Mass.	760.00
Nytanday Letter Mfg. Co.	New York City	35.00
New England Trust Co., The	135 Devonshire St., Boston, Mass.	119,500.00
National Folding Box & Paper Co.	New Haven, Conn.	3,490.45
Ostrich & Fancy Feather Boa Co.	24-34 University Pl., N. Y. City	120.00
Perry Real Estate Trust.	Boston, Mass	107,890.14
Gardiner, Rob't H.	Boston, Mass.	9,666.66

Name.	Address.	Amount.
Premier Knitting Co.	104 N. 6th St., Philadelphia, Pa.	147.00
Porteous & Mitchell Co.	Norwich, Conn.	205.23
Russell, Albert Co.	Boston, Mass.	878.85
Sullivan, Elizabeth F.	Boston, Mass.	2,666.00
Sargent Trust	Boston, Mass.	37,000.00
Spivack Bros.	142 W. 24th St., N. Y. City.	168.76
Warner Bros. Co., The	Bridgeport, Conn.	117.88
Altschuler, Fannie	New York City	Amount not stated
Filene's Sons Co., Wm.	Boston, Mass.	" " "
Gilchrist Co.	Boston, Mass.	" " "
48		
New England Trust Co.		200.02
		$337,972.07
Ullman Bros.	37 W. 20th St. N. Y.	$57.00 338,172.08

At a later term, the following Stipulation, relative to claim of Robert H. Gardiner, trustee, was filed:—

Stipulation.

[Filed December 17, 1914.]

It is hereby stipulated that the claim of Robert H. Gardiner, Trustee, v. William S. Butler & Company, Incorporated, was duly included in the list attached to the order of court referring disputed claims against William S. Butler & Company, Incorporated, to the special master.

WARREN, GARFIELD, WHITESIDE & LAMSON,
Attorneys for Robert H. Gardiner, Trustee.
CHOATE, HALL & STEWART,
Attorneys for the Receivers of William S. Butler & Company, Incorporated, and Everybody's Store, Incorporated.

On the aforementioned fifteenth day of December, A. D. 1913, the following Order extending time for proving claims against William S. Butler & Company, Incorporated, nunc pro tunc from October 1 to December 12, 1913, was entered:—

Order as to Proving of Claims.

December 15, 1913.

DODGE, *J.:*

This cause came on to be heard on December 13, 1913, upon the receivers' suggestion for a final decree relative to allowance and disallowance of claims, and it appearing that all claims have been con-

sidered by the receivers if filed on or before December 12th, it is hereby ordered that the time for filing proofs of claim is hereby extended nunc pro tunc from October 1 until December 12, 1913, and that all creditors whose claims have not been presented prior
49 to said date shall be forever barred from participation in the distribution of the assets.

By the Court,

CHARLES K. DARLING.

Also on the same day, the following Order as to proof of claims in the matter of Everybody's Store, Incorporated, was entered:—

Order Extending Time for Proof of Claims in the Matter of Everybody's Store, Incorporated.

December 15, 1913.

DODGE, *J.:*

This cause came on to be heard on December 13, 1913, upon the receivers' suggestion for a final decree relative to allowance and disallowance of claims, and it appearing that all claims have been considered by the receivers if filed on or before December 12th, it is hereby ordered that the time for filing proofs of claim is hereby extended nunc pro tunc from October 1, 1913, until December 12, 1913, and that all creditors whose claims have not been presented prior to said date shall be forever barred from participation in the distribution of the assets.

By the Court,

CHARLES K. DARLING, *Clerk.*

Also on the same day, the following Decree upon Disputed Claims was entered:—

Decree upon Disputed Claims in the Matter of Everybody's Store, Incorporated.

December 15, 1913.

DODGE, *J.:*

This cause came on to be heard on November 25, 1913, and thereafter by continuance on December 13, 1913, upon the receivers' petition relative to allowance and disallowance of claims and their several supplemental reports thereon, and thereupon it appearing that due notice thereof has been given to creditors as directed by the court, and that claims set forth in Exhibit C hereto annexed are in dispute between the several claimants and the receivers, and that exceptional conditions require a reference for speedy determi-
50 nation of the issue, it is ordered that said claims be referred to Frankiin T. Hammond, Esq., as special master to hear the parties and their evidence and report to the court thereon.

By the Clerk,

CHARLES K. DARLING, *Clerk.*

EXHIBIT C.

Everybody's Store, Inc.

Name.	Address.	Amount.
Brooks, Geo. & Son Co.	55th St., & Wyalusing Ave., Philadelphia	$320.99
Colgate & Co.	199 Fulton St., N. Y. City	4.20
Dimond, H. C. & Co.	185 Franklin St., Boston, Mass.	36.84
Gardiner, Rob't H. (Trustee) of Perry Real Estate Trust	Boston, Mass.	107,890.14
Gardiner, Rob't H., Trustee	Boston, Mass.	9,666.66
Greenberg, Louis & Bros.	114 E. 23rd St., N. Y. City.	164.25
Guggenheim Co.	801 Lakeside Ave., Cleveland, O.	297.55
Kelly, Thomas & Co.	89 Chauncy St., Boston, Mass.	1,456.36
Kleinert, I. B. Rubber Co.	721 Broadway, N. Y. City.	15.02
Linehan-Conover Co.	Worcester, Mass.	197.88
Locke & Clarke Co.	894 Broadway, New York City	461.77
Luzerne Skirt Co.	Wilkes-Barre, Pa.	365.58
McLean, Isaac Sons Co.	Dorchester St., Boston, Mass	8,887.05
Martin Mfg. Co.	West Newton, Mass.	160.35
Musman, Samuel	786 Washington St., Boston, Mass.	81.00
National Folding Box & Paper Co.	New Haven, Co.	74.94
Standard Mfg. Co.	81 Bedford St., Boston, Mass.	92.38
Standard Neckwear Co.	39 Kingston St., Boston, Mass.	32.13
Union Stamp Works.	175 Washington St. Boston, Mass.	29.45
Warner Bros. Co., The	225 Fifth Ave., N. Y. City.	40.64
Wayne Knitting Mills.	Fort Wayne, Ind.	822.82
Wimelbacker & Rice.	510 Broadway, N. Y. City.	273.25
Women's Wear Co.	42 E. 21st St., New York City	18.00
Zuch, L. P.	694 Washington St., Boston, Mass.	201.11
Levi Bros.	120 Wooster St., N. Y. City	286.38
Russell, Albert C.	Boston, Mass.	878.85
		$132,755.59
Stanton Bros.	596 Broadway, N. Y.	13.20

At a later term, the following Stipulation, relative to claim of Robert H. Gardiner, trustee, was filed:—

51 *Stipulation.*

[Filed December 17, 1914.]

It is hereby stipulated that the claim of Robert H. Gardiner, Trustee, v. Everybody's Store, Incorporated, was duly included in the list attached to the order of court referring disputed claims against Everybody's Store, Incorporated to the special master.

WARREN, GARFIELD, WHITESIDE & LAMSON,
Attorneys for Robert H. Gardiner, Trustee
CHOATE, HALL & STEWART,
Attorneys for the Receivers of William S. Butler & Company, Incorporated, and Everybody's Store Incorporated.

On the thirty-first day of said December, A. D. 1913, the following Order of Court as to Payment of Dividend to Creditors was entered:

Order of Court as to Payment of First Dividend to Creditors.

December 31, 1913.

DODGE, *J.:*

This cause came on to be heard upon the petition of the receivers for authority to pay a first dividend to creditors of William S. Butler & Company, Incorporated, whose claims have been allowed, and it appearing that due notice has been given to all creditors of said corporation, it is ordered, adjudged and decreed that the receivers pay a first dividend to said claimants of fifteen per cent of their claims as duly proved and allowed.

By the Court,

CHARLES K. DARLING, *Clerk.*

This cause was thence continued to the March Term, A. D. 1914, when, to wit, April 4, 1914, the following Decree upon Receivers' Petition Relative to Payment of First Dividend was entered:

52 *Decree Upon Receivers' Petition Relative to Payment of First Dividend.*

April 4, 1914.

DODGE, *J.:*

This cause came on to be heard upon the petition of the receivers for authority to pay a first dividend to creditors of Everybody's Store, Incorporated, whose claims have been allowed and it appearing that due notice has been given to all creditors of said corporation, and no one appearing to object thereto, it is ordered, adjudged and decreed that the receivers pay a first dividend to said claimants of fifty-five per cent of their claims as duly proved and allowed.

By the Court,

CHARLES K. DARLING, *Clerk.*

At the same term, to wit, April 14, 1914, a Report of Special Master was filed, part of which reads as follows:

Extract from Report of Special Master in Regard to Claims of Robert H. Gardiner, Trustee.

[Filed April 14, 1914.]

9. Claims of Robert H. Gardiner, Trustee of the Perry Real Estate Trust, against William S. Butler & Company, Incorporated, and Everybody's Store, Incorporated.

The claims in this case are for rent under a lease and for damages for termination of the lease on account of the default on the part of the lessee.

By a lease dated December 19, 1910, and recorded in the registry of deeds for Suffolk County on August 8, 1911, the claimant leased to William S. Butler & Company, Incorporated, certain premises on Bosworth Street, Chapman Place and Province Street in Boston, for a term of nine years and four months from January 1, 1911, at an annual rental of $11,000 for the first four years and four months and $12,000 for the last five years of the term, payable monthly.

The lease contained the following provisions:

53 "This lease is made on condition also that if the lessee shall neglect or fail to perform or observe any of the covenants herein contained on the lessee's part to be performed or observed or if the estate hereby created shall be taken on execution or other process of law or if the lessee shall petition to be or be declared bankrupt or insolvent according to law, or if a receiver, guardian, conservator or other similar officer shall be appointed to take charge of any part of the property of or to wind up the affairs of the lessee, or if any assignment shall be made of the lessee's property for the benefit of creditors then and in either of the said cases the lessor lawfully may immediately or at any time thereafter, and without demand or notice enter into and upon the demised premises or any part thereof in the name of the whole and repossess the same as of his former estate and expel the lessee and those claiming through or under him and remove the effects of both or either forcibly if necessary without being deemed guilty of any manner of trespass and without prejudice to any remedies for arrears of rent or preceding breach of covenant, and upon entry as aforesaid the lessee's estate shall end. And the lessee covenants that in case of such termination or of termination under the provisions of statute by reason of default on the part of the lessee, the lessee will at the election of the lessor which election may be made or changed at any time either (*a*) pay to the lessor sums equal to the rent and other payments herein named at the same times and in the same installments or, if the premises shall have been re-let, sums equal to the difference between the aforesaid and the sums actually received by the lessor in proportionate installments as liquidated damages for so much of the unexpired term as is repre-

sented by such installments; or (*b*) pay to the lessor as damages a sum which at the time of such termination or at the time to which installments of liquidated damages shall have been paid, represents the difference between the rental value of the premises and the rent and other payments herein named for the residue of the term; or (*c*) indemnify the lessor against loss of rent and other payments herein named from the time of such termination or from the time to which installments of liquidated damages shall have been paid during the residue of the term."

This lease together with other leases was assigned by Butler & Company, to Everybody's Store, Incorporated, hereinafter called Everybody's, by assignment dated September 30, 1912, and this assignment was assented to by the claimant.

Everybody's took possession of these premises together with other premises on September 9, 1912, and occupied the same there-
54 after until it and William S. Butler & Company, Incorporated, went into the hands of receivers on November 7, 1912, and thereafter until December 30, 1912, the receivers of Everybody's occupied said premises.

On December 16, 1912, the receivers of both companies notified the claimant "of their election not to affirm, assume or in any way be responsible under the lease from you to William S. Butler & Company, Inc., dated December 19, 1910." In the same letter they stated that they intended to vacate the premises as soon as conveniently possible and that for use and occupation from November 7, 1912, until they did vacate the premises they would pay such reasonable rent as might be agreed upon.

On December 30, 1912, the receivers notified the claimant that they would vacate the premises December 31, 1912, and they actually did so vacate on that day.

Thereafter the claimant and the receivers agreed on the amount which the receivers should pay for their use and occupation of the premises and this amount was paid.

On January 6, 1913, this court authorized the claimant to assume the custody of the premises without affecting his rights under the lease, the order stating that the lease and the obligations and covenants of the two companies thereunder should remain in full force and effect as if the possession of Everybody's had continued undisturbed.

On October 1, 1913, the claimant made a formal entry under the lease of December 19, 1910, for the purpose of terminating it for breach of covenant and in accordance with its terms.

Meanwhile on May 27, 1913, the claimant as trustee as aforesaid bought a little building adjoining the premises leased to the Butler Company by the lease of December 19, 1910. This building was situated on the corner of Chapman Place and Bosworth Street and was then owned by Albert C. Russell. Russell had leased it to William S. Butler & Company, Incorporated, by a lease dated April 10, 1911, and recorded in the registry of deeds for Suffolk County on August 8, 1911, for a term ending March 31, 1921, at a yearly rental of $2000 a year, payable in equal monthly pay-

55 ments. The receivers of the Butler Company had elected not to affirm the Russell lease on December 13, 1912, and had vacated the premises on December 30, 1912. The Russell building was so situated as to be capable of constituting, when joined with the Gardiner building as shown by the plan of the two estates hereto annexed marked "A," a single large building and thereby adding to the chances of finding a tenant as a fair rental. By the terms of the purchase of the Russell building by the claimant on May 27, 1913, the claimant became entitled to all the rights which the seller Russell had against William S. Butler & Company and Everybody's after June 1, 1913.

On June 11, 1913, Gardiner applied to this court for leave to reenter on the Russell premises and terminate the lease "in order that he may be in a position to negotiate such disposition of the leased premises as will be most advantageous and will cause the least loss," but without waiving any rights he might have against the lessee or assignee. On June 16, 1913, this court entered an order on this petition permitting Gardiner "to enter upon said premises and thereby to terminate said lease without waiving any rights he may against the lessee thereunder or assignee thereof." Thereafter the claimant did so enter and terminate the lease. The lease of the Russell building to William S. Butler & Company, Incorporated, had been assigned by the Butler Company to Everybody's by the assignment of September 30, 1912, and Russell had assented to the assignment.

On November 7, 1912, Butler & Company was insolvent in both the bankruptcy and common law senses of that term, and on that date Everybody's was unable to meet its debts as they matured in the ordinary course of business. If the question of its solvency or insolvency on that date becomes material, the parties have agreed that the report may be recommitted and either party may introduce evidence upon that issue.

The receivers of Butler & Company and the receivers of Everybody's have sold and converted into cash all the assets of both corporations, and in neither case is there sufficient to pay creditors in full, even though the claims of Gardiner are not allowed.

The claim which the claimant seeks to prove is as follows:

56 Under the Gardiner lease he seeks to prove for the rent and other payments which the lessee was required to make from November 1, 1912, to October 1, 1913, less the amount paid by the receivers and also less certain amounts received for use and occupation of the said premises during that period. The amount of this claim is $7847.54.

The claimant also seeks to prove under the Gardiner lease a claim for $69,992.60, which represents the rents reserved and other payments which the lessee was required to make under the Gardiner lease from October 1, 1913, through April 30, 1920, after deducting actual payments received or estimated rents of the premises based on average net rentals for the past five years. Under the so-called Russell lease the claimant seeks to prove a claim for $9,666.66, being the amount of rent from June 1, 1913, to March 31, 1921, under the so-called Russell lease, less estimated collections for that same period.

The claimant contends that he has the claims aforesaid against the Butler Company as original lessee under both the Gardiner and the Russell leases, and against Everybody's as assignee of the original lessee; but he does not contend that he can get more than one satisfaction of this claim, i. e., that he can collect more than his total claim.

The receivers contend as in the Filene case that there was no breach of either the Russell lease or the Gardiner lease until after their appointment. The case raises substantially the same questions of law as were raised in the Filene case and in the case of Charles E. Cotting et al., trustees. The receivers objected to any evidence in support of the claims of the claimant on the ground that proof of damages was immaterial.

It seemed to me proper before hearing the parties upon the question of damages to report to the court the question whether under the circumstances of this case the claimant has any provable claim for any damages sustained by him.

It appears that no rent was ever paid by either Butler & Company or Everybody's for the first seven days of November, 1912.

* * * * * * *

FRANKLIN T. HAMMOND,
Special Master.

57 Also at the same term, to wit, May 25, 1914, this cause came on to be heard on the master's report as to claims of Robert H. Gardiner, trustee, and Albert C. Russell and Adelaide J. Sargent et al., trustees, against William S. Butler & Company, Incorporated, and as to claims of said Gardiner, trustee, and said Russell against Everybody's Store, Incorporated, the Honorable Frederic Dodge, Circuit Judge, duly assigned to hold said District Court, sitting.

Said cause was thence continued under advisement from term to term to the September Term, A. D. 1914, when, to wit, October 31, 1914, an opinion of the court was announced.

This cause was thence continued to the present December Term, A. D. 1914, when, to wit, December 12, 1914, the following Final Decree on Claims of Robert H. Gardiner, Trustee, is entered:—

Final Decree on Claims of Robert H. Gardiner, Trustee.

December 12, 1914.

DODGE, *J.:*

This cause came on to be heard at this term upon the report of the special master regarding the above-entitled claim, and was argued by counsel, and thereupon, upon consideration thereof, it is—

Ordered, adjudged and decreed, that the claim of Robert H. Gardiner, trustee, against William S. Butler & Company, Incor-

porated, be and the same hereby is allowed in the sum of $213.89 and disallowed for the balance of said claim, or any part thereof; and that the claim of Robert H. Gardiner, trustee, against Everybody's Store, Incorporated, be and the same hereby is allowed in the sum of $213.89 and disallowed for the balance of said claim, or any part thereof.

By the Court,

JOHN E. GILMAN, JR.,
Deputy Clerk.

From the foregoing decree, Robert H. Gardiner, trustee, claimant, claims an appeal to the United States Circuit Court of Appeals for the First Circuit, and gives good and sufficient security that he will prosecute his appeal to effect and answer all damages and
58 costs if he fail to make his plea good, and said appeal is allowed accordingly.

Opinion of the Court.

October 31, 1914.

DODGE, *J.:*

This is one of the claims referred to a special master by order entered December 15, 1913, to hear the parties and their evidence and report thereon. The master's findings of facts upon which the questions to be decided depend are not disputed.

The claimant's rights against the Butler Company are those which belong to him as lessor, under the two leases to it, to which the master refers, and from which he has quoted the provisions here important. The leases are so unlike in their provisions as to make it necessary to consider each by itself. In both, the term was unexpired when the receivers were appointed. They, as will appear, did not adopt either.

1. The lease under which the claim largest in amount is made is dated December 19, 1910. The premises are on Bosworth Street, Chapman Place and Province Street, in Boston. The term was to be nine years and four months from January 1, 1911. The annual rental was to be $11,000 for the first four years and four months, and $12,000 for the last five years. It was payable in monthly instalments. The Butler Company occupied the premises and paid the rent up to September 30, 1912. On that date it assigned the lease to Everybody's Store, with the lessor's assent. Thereafter, until the receivership on the November 7th following, Everybody's Store occupied the premises and paid the rent.

The receivers appointed on the above date for both companies elected not to adopt the lease on behalf of either, and so notified the claimant on December 16, 1912. They vacated the premises on December 31, 1912. They have paid for their use and occupation an amount agreed upon with the claimant. From January 1 to October 1, 1913, the claimant had the custody of the premises. An order entered January 6, 1913, by consent, provided that the claimant's

rights should continue the same, notwithstanding his custody, as if Everybody's tenancy had continued undisturbed.

59 The claimant had the right under the lease to enter without demand or notice and repossess the premises as of his former estate, without prejudice to any remedies for arrears of rent or preceding breach of covenant, upon any failure by the lessee to perform its covenants, or if a receiver of its property should be appointed. This right, however, he did not exercise until October 1, 1913, when he entered for the purpose of terminating the lease for breach of covenant and in accordance with its terms. The monthly instalments of rent falling due between January 1 and October 1, 1913, remain unpaid.

The lease also provided that in case of such termination as above the lessee would, at the lessor's election, which might be made or changed at any time, either (*a*) pay the lessor sums equal to the rent, etc., at the same times and in the same instalments, or, if the premises should have been re-let, equal to the difference between the aforesaid and the sums actually received by the lessor, in proportionate instalments, as liquidated damages, until the expiration of the term; or (*b*) pay the lessor as damages a sum representing the difference between the rental value of the premises and rent, etc., for the residue of the term; or (*c*) indemnify the lessor against loss of rent, etc., from the termination of the lease during the residue of the term. The general effect only of these agreements is here stated. They are quoted in full by the master in his report.

The claim made under this lease is for $7,847.54, being the amount of all the rent, etc., which fell due according to the lease between November 1, 1912, and October 1, 1913, less the amount paid by the receivers for use and occupation, and less also certain amounts received by the claimant from others for use and occupation during the same period. It includes also the further sum of $69,992.60, being the total rental reserved by the lease from October 1, 1913, to the end of term,—less actual payments received, or estimated rents of the premises based on average net rentals for the past five years.

The receivers objected to any evidence in support of these claims on the ground that proof of damages was immaterial. The master, before hearing the parties upon the question of damages, has

60 reported to the court the question whether the claimant has any provable claim for any damages.

As to the rent and other payments required by the lease between November 1, 1912, and October 1, 1913, or so much thereof as is not made good to the lessor by what the receivers and other parties have paid him for use and occupation of the premises during that period, I rule that no claim is allowable in these proceedings. During all this period the lease remained in force, and by the lessor's own choice, to whom the lease reserved the right, which he might have exercised at any time after November 7, 1912, of terminating it because of the receiver's appointment, besides the right which he might have exercised at any time after December 1, 1912, of terminating it because of default in payment of rent. No part of the indebtedness for rent

which he now claims was due him on November 7, 1912. Whether there would ever be any such indebtedness or not, then rested wholly in contingency, the successive monthly periods of tenancy for which it has since accrued being then all in the future. Though the allowable claims are not confined strictly to such as were fixed liabilities absolutely owing on November 7, 1912, a claim thus arising out of and depending on dealings between lessor and lessee after the lessee's receivership I cannot regard as equitably entitled to share in the distribution of the estate. See the opinion this day filed herein relating to the claim presented by Albert C. Russell and based upon similar facts.

As to the claim for $69,992.60 under the provisions of the lease for "liquidated damages," "damages" or "indemnity," upon termination of the lease by the lessor in case of default by the lessee or receivership of its property, I make the same ruling. The provisions are substantially the same as those considered in the opinion this day filed herein regarding the claim presented by Wm. Filene's Sons Company, with the exception only that there is no clause expressly making the payments they purport to require provable in bankruptcy, insolvency or receivership proceedings. The provisions referred to, however, gave rise to no claim by the lessor in any event until eleven months had passed after the receivership, and such claim as then came into being was dependent, both as to origin and
61 amount, upon the exercise of a choice by the lessor, reserved to him by agreements with the lessee, calculated to give him an advantage over other creditors in the event of insolvency. The term of the lease does not expire until 1920, and the same reasons exist against recognizing, as entitled to share in this distribution, a claim consisting of accelerated rental to accrue after October, 1913, less the estimated value of rents obtainable during the same period, ascertained by average net rental for the last five years, as in the case of Filene's Sons Company.

2. The other lease relied on is also a lease to the Butler Company. It was originally made by Albert C. Russell as lessor, and is the same lease considered in the opinion herein, this day filed, upon a claim presented in these proceedings by Russell. As there stated, it is dated April 10, 1911, runs until March 31, 1921, and provides for an annual rental of $2000, payable in monthly instalments. The receivers having declined to adopt it, and having vacated the premises on December 30, 1912, Russell took no steps to terminate the lease, and at the end of May, 1913, conveyed the premises to Gardiner, together with all his rights under the lease from June 1, 1913. Gardiner thereafter entered for non-payment of rent, by leave of court, and now presents a claim for $9666.96, being the total of the rentals which would have accrued under the lease until its expiration in 1921, less estimated probable receipts from the premises by the lessor for the same period. The amount of this deduction he proposes to fix by "estimated collections" for the last five years.

Russell's claim for the monthly rentals which accrued under the lease after the receivership from November, 1912, to June, 1913, has been disallowed for the reason stated in the opinion referred to.

As to the present claim by the successor to his rights, who after acquiring the lease has terminated it, for damages to the amount of future rental lost, less estimated collections, as above, the lease has no provision purporting to accelerate the future rentals in case the lessor should enter as he has done. Had it contained such provisions, I should have been obliged to hold that they gave him no claim here allowable, for the reasons stated in the opinion
62 relating to the Filene lease. In their absence, as will be obvious from what has been stated in that opinion and the opinion disallowing the claim by Russell, I must hold that no allowable claim exists.

Both the leases here involved were assigned by the Butler Company to Everybody's Store September 30, 1912, the lessor assenting upon condition that the Butler Company remained liable upon the covenants. The result at which I arrive, however, forbids the allowance of any claim under either lease against either company, except for a proportion of the November, 1912, rent, accruing during the first seven days of that month. This amounts to $213.89, and is not objected to by the receivers. The claim is therefore allowed in that amount against the companies named and is otherwise disallowed.

Petition for Appeal.

[Filed December 17, 1914.]

Respectfully represents the claimant, Robert H. Gardiner, trustee, that he is aggrieved by decree entered by this court under date of December 12, 1914, on the report of the special master regarding his claims, and does hereby appeal from said decree for the reasons stated in his assignment of errors filed herewith, and he respectfully prays that his appeal may be allowed, and that a transcript of the record, papers and proceedings upon which decree was so made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the First Circuit.

By His Attorneys, WARREN, GARFIELD, WHITESIDE, & LAMSON.

December 17, 1914, appeal allowed.
FREDERIC DODGE,
U. S. Cir. J.

63 *Assignment of Errors.*

[Filed December 17, 1914.]

The claimant, Robert H. Gardiner, trustee, respectfully specifies the following assignment of errors on which he will rely in prosecuting his appeal from the decree of this court entered on December 12, 1914, on the report of the special master regarding his claim:—

1. That the court erred in disallowing the balance over two hundred thirteen dollars and eighty-nine cents ($213.89) of the claimant's claim against William S. Butler & Company, Incorporated, or any part thereof.

2. That the court erred in disallowing the balance over two hundred thirteen dollars and eighty-nine cents ($213.89) of the claimant's claim against Everybody's Store, Incorporated, or any part thereof.

3. That the court erred in not ruling that the claimant had a provable claim against the assets of said William S. Butler & Company, Incorporated, in the hands of the receivers in excess of two hundred thirteen dollars and eighty-nine cents ($213.89).

4. That the court erred in not ruling that the claimant had a provable claim against the assets of said Everybody's Store, Incorporated, in the hands of the receivers in excess of two hundred thirteen dollars and eighty-nine cents ($213.89).

5. That the court erred in not ruling that the claimant had a provable claim against the assets of William S. Butler & Company, Incorporated, in the hands of the receivers, under the lease from him to William S. Butler & Company, Incorporated, dated December 19, 1910, referred to in the report of the special master, in excess of two hundred thirteen dollars and eighty-nine cents ($213.89).

6. That the court erred in not ruling that the claimant had a provable claim against the assets of William S. Butler & Company, Incorporated, in the hands of the receivers, under the lease from Albert C. Russell to William S. Butler & Company, Incorporated, dated April 10, 1911, referred to in the report of the special master.

7. That the court erred in not ruling that the claimant had
64 a provable claim against the assets of Everybody's Store, Incorporated, in the hands of the receivers, under the lease from him to William S. Butler & Company, Incorporated, dated December 19, 1910, referred to in the report of the special master, in excess of two hundred thirteen dollars and eighty-nine cents ($213.89).

8. That the court erred in not ruling that the claimant had a provable claim against the assets of Everybody's Store, Incorporated, in the hand of the receivers, under the lease from Albert C. Russell to William S. Butler & Company, Incorporated, dated April 10, 1911, referred to in the report of the special master.

9. That the court erred in not ruling that the claimant had a provable claim for damages against the assets of William S. Butler & Company, Incorporated, in the hands of the receivers, under the terms of the lease from the claimant to William S. Butler & Company, Incorporated, dated December 19, 1910, referred to in the report of the special master, in excess of two hundred thirteen dollars and eighty-nine cents ($213.89).

10. That the court erred in not ruling that the claimant had a provable claim for damages against the assets of William S. Butler & Company, Incorporated, in the hands of the receivers, under the terms of the lease from Albert C. Russell to William S. Butler & Company, Incorporated, dated April 10, 1911, referred to in the report of the special master.

11. That the court erred in not ruling that the claimant had a provable claim for damages against the assets of Everybody's Store, Incorporated, in the hands of the receivers, under the terms of the lease from the claimant to William S. Butler & Company, Incorporated, dated December 19, 1910, referred to in the report of the special master, in excess of two hundred thirteen dollars and eighty-nine cents ($213.89).

12. That the court erred in not ruling that the claimant had a provable claim for damages against the assets of Everybody's Store, Incorporated, in the hands of the receivers, under the terms of the lease from Albert C. Russell to William S. Butler & Company, Incorporated, dated April 10, 1911, referred to in the report of the special master.

65 Wherefore the claimant respectfully prays that said decree may be reversed.

By his Attorneys, WARREN, GARFIELD, WHITESIDE, & LAMSON.

Bond on Appeal.

[Filed December 17 and Approved December 18, 1914.]

Know all Men by these Presents, that we, Robert H. Gardiner, Trustee of Perry Real Estate Trust under declaration of trust dated October 1, 1904, recorded in Suffolk Registry of Deeds Book 2295, Page 465, as principal, and New England Casualty Company, a corporation duly established under the laws of the Commonwealth of Massachusetts, and having a usual place of business in Boston, in the County of Suffolk, and Commonwealth of Massachusetts, as surety, are held and firmly bound unto William S. Butler and Com. Inc., and Everybody's Store, Inc., in the full and just sum of Two Hundred Fifty and no/100 ($250.00) Dollars to be paid to the said William S. Butler and Company, Inc., and Everybody's Store, Inc., their certain attorneys, successors or assigns, to which payment well and truly to be made we bind ourselves, our successors, and assigns jointly and severally, by these presents. Sealed with our seals and dated this sixteenth day of December in the year of our Lord one thousand nine hundred and fourteen.

Whereas, lately at a District Court of the United States for the District of Massachusetts in a suit in equity No. 396 depending in said Court between Robert H. Gardiner, Trustee of Perry Real Trust under declaration of Trust dated October 1, 1904, recorded in Suffolk Registry of Deeds, Book 2295, Page 465, complainant against William S. Butler and Company, Inc., and Everybody's Store, Inc., respondents, a decree was entered against the said Robert H. Gardiner, Trustee of Perry Real Estate Trust under declaration of Trust dated October 1, 1904, recorded in Suffolk Registry of Deeds Book 2295, Page 465, and the said Robert H. Gardiner, Trustee of Perry Real Estate Trust under declaration of Trust dated October

66 1, 1904, recorded in Suffolk Registry of Deeds Book 2295,

Page 465, having obtained an appeal to remove said cause to the United States Circuit Court of Appeals for the First Circuit, to reverse the decree in the aforesaid suit, and a citation directed to the said William S. Butler & Company, Inc., and Everybody's Store, Inc., citing and admonishing them to be and appear in the said United States Circuit Court of Appeals for the First Circuit in the city of Boston, Massachusetts, on the First Monday of January, 1915.

Now, the condition of the above obligation is such that if the said Robert H. Gardiner, Trustee of Perry Real Estate Trust under declaration dated October 1, 1904, recorded in Suffolk Registry of Deeds Book 2295 Page 465, shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his appeal good, then the above obligation to be void; else to remain in full force and virtue.

ROBERT H. GARDINER, [SEAL.]
Trustee of Perry Real Estate Trust under Declaration of Trust Dated October 1, 1904, Recorded in Suffolk Registry of Deeds Book 2295, Page 465.

[SEAL.] NEW ENGLAND CASUALTY COMPANY,
By EDWARD W. BRIGGS, *Vice-President.*

Attest:

WM. J. LEWIS,
Ass't Secretary.

Sealed and Delivered in the Presence of

—— ——.

[Internal Revenue stamps cancelled.]

Approved:

FREDERIC DODGE,
U. S. Cir. J.

Stipulation as to Præcipe, Order Thereon and Præcipe.

[Filed December 17, 1914.]

Stipulation.

It is stipulated that the annexed præcipe enumerates all the papers necessary to the decision of the questions presented by the appeal to be made herein from the order of the court of December 12, 1914.

67 It is consented that the claimant may appeal to the Circuit Court of Appeals from the order entered herein on December 12, 1914, and that all proceedings under said order shall be stayed

until the hearing and determination of said appeal and the coming down of the mandate without the filing of any supersedeas bond.

WARREN, GARFIELD, WHITESIDE & LAMSON,
Attorneys for Robert H. Gardiner, Trustee.
CHOATE, HALL & STEWART,
Attorneys for Receivers of William S. Butler & Company and Everybody's Store, Incorporated.

Order as to Record and Supersedeas.

December 17, 1914.

DODGE, *J.:*

This cause came on to be heard at this sitting, and it appearing that all parties assent thereto, it is ordered:

That the clerk shall certify as a transcript of record herein the papers enumerated on the annexed præcipe.

That all proceedings under the order entered herein December 12, 1914, be stayed until the hearing and determination of the appeal herein and the coming down of the mandate without the filing of any supersedeas bond.

By the Court,

JOHN E. GILMAN, JR.,
Deputy Clerk.

Præcipe.

Bill of complaint filed November 7, 1912.

Answer of the respondent filed November 7, 1912.

Decree appointing receivers filed November 7, 1912.

Petition of Everybody's Store, Incorporated, to be made a party, and that the receivership under bill of complaint be extended to its property, filed November 7, 1912.

Decree on said petition of Everybody's Store, Incorporated, entered November 7, 1912.

Decree appointing Edward B. Wilson co-receiver of William S. Butler & Company, Incorporated, dated December 3, 1912.

68 Decree appointing Edward B. Wilson co-receiver of Everybody's Store, Incorporated, dated December 3, 1912.

Order of court dated November 11, 1912, relative to proof of claims v. William S. Butler & Company, Incorporated.

Order of court dated December 17, 1912, extending time for proof of claims v. William S. Butler & Company, Incorporated.

Order of court dated January 13, 1913, extending time for proof of claims v. William S. Butler & Company, Incorporated.

Order of court dated February 11, 1913, extending time for proof of claims v. William S. Butler & Company, Incorporated.

Order of court dated March 24, 1913, extending time for proof of claims v. William S. Butler & Company, Incorporated.

Order of court dated April 29, 1913, extending time for proof of claims v. William S. Butler & Company, Incorporated.

Order of court dated September 11, 1913, limiting time for proving claims v. Everybody's Store, Incorporated.

Order of court dated May 26, 1913, extending time for proof of claims v. William S. Butler & Company, Incorporated.

Order of court dated July 1, 1913, extending time for proof of claims v. William S. Butler & Company, Incorporated.

Order of court dated July 24, 1913, extending time for proof of claims v. William S. Butler & Company, Incorporated.

Order of court dated August 27, 1913, extending time for proof of claims v. William S. Butler & Company, Incorporated.

Order of court dated December 15, 1913, extending time for proof of claims v. William S. Butler & Company, Incorporated.

Order of court dated December 15, 1913, extending time for proof of claims v. Everybody's Store, Incorporated.

Petition of receivers of William S. Butler & Company, Incorporated, dated December 17, 1912, for leave to sell assets.

Decree dated December 26, 1912, on petition of receivers of William S. Butler & Company, Incorporated, for leave to sell assets.

Petition of receivers of Everybody's Store, Incorporated, dated September 10, 1913, for leave to sell assets.

Decree dated September 16, 1913, on petition of receivers of Everybody's Store, Incorporated, for leave to sell assets.

69 Petition of Robert H. Gardiner, trustee, for leave to assume custody of the premises, dated January 6, 1913.

Decree dated January 6, 1913, on petition of Robert H. Gardiner, trustee, for leave to assume custody of the premises.

Proofs of claim of Robert H. Gardiner, trustee, filed October 1, 1913.

Amended proofs of claim of Robert H. Gardiner, trustee, filed December 1, 1913, and order thereon.

Lease from Robert H. Gardiner, trustee, to William S. Butler & Company, Incorporated, and assignment thereof by William S. Butler & Company, Incorporated, to Everybody's Store, Incorporated.

Lease from Albert C. Russell to William S. Butler & Company, Incorporated, and assignment thereof by William S. Butler & Company, Incorporated, to Everybody's Store, Incorporated.

Order of court referring disputed claims against William S. Butler & Company, Incorporated, to special master and stipulation that claim of Robert H. Gardiner, trustee, was included in the list attached to said order.

Order of court referring disputed claims against Everybody's Store, Incorporated, to special master and stipulation that claim of Robert H. Gardiner, trustee was included in the list attached to said order.

Order of court dated December 31, 1913, directing receivers of William S. Butler & Company, Incorporated, to pay first dividend to creditors.

Order of court dated April 4, 1914, directing receivers of Everybody's Store, Incorporated, to pay first dividend to creditors.

Report of special master.
Decree of the District Court.
Petition of appeal and allowance thereof.
Opinion of the court, October 31, 1914.
Assignment of errors.
Bond on appeal.
Stipulation for præcipe and order thereon.
Citation on appeal.
Clerk's certificate.

70 *Citation on Appeal.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Wm. S. Butler & Co., Inc., a corporation organized under the laws of the Commonwealth of Massachusetts, and Charles F. Weed, Milroy H. Gibson and Edward B. Wilson, Receivers of Wm. S. Butler & Co., Inc., Everybody's Store, Inc., and Charles F. Weed, Milroy H. Gibson and Edward B. Wilson, Receivers of Everybody's Store, Inc., Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the fifth day of January, 1915, pursuant to an appeal duly obtained from a decree of the District Court of the United States for the District of Massachusetts, wherein Robert H. Gardiner, Trustee, is appellant, and you are appellee, to show cause, if any there be, why the decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Frederic Dodge, Circuit Judge, duly assigned to hold the District Court of the United States for the District of Massachusetts, this seventeenth day of December, in the year of our Lord one thousand nine hundred and fourteen.

FREDERIC DODGE,
U. S. Circuit Judge.

Acknowledgment of Service on Citation.

December 22, 1914.

Service of the above citation is hereby acknowledged.

WILLIAM S. BUTLER & COMPANY, INC.,
CHARLES F. WEED,
MILROY H. GIBSON, AND
EDWARD B. WILSON,
Receivers of William S. Butler & Co., Inc.;
EVERYBODY'S STORE, INC.,
CHARLES F. WEED,
MILROY H. GIBSON, AND
EDWARD B. WILSON,
Receivers of Everybody's Store, Inc.

By Their Attorneys,
CHOATE, HALL & STEWART.

71 & 72 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, William Nelson, Clerk of the District Court of the United States, within and for the District of Massachusetts, certify that the foregoing is a true copy of the record and all proceedings in the matter of the Claims of Robert H. Gardiner, Trustee, v. William S. Butler & Company, Incorporated, and Everybody's Store, Incorporated, filed in the cause in equity entitled, No. 396, Isaac McLean Sons Company, Complainant, v. William S. Butler & Company, Incorporated, Defendant, now pending in said District Court, the Opinion of the Court, of October 31, 1914, the Petition for Appeal, the Assignment of Errors, the Bond on Appeal, Stipulation as to Præcipe, Order thereon and Præcipe, and also the original Citation issued upon the appeal of Robert H. Gardiner, Trustee, claimant in said cause, with the Acknowledgment of Service thereon.

In testimony whereof, I hereto set my hand and affix the seal of said District Court, at Boston, in said district, this second day of January, A. D. 1915.

[SEAL.] WILLIAM NELSON, *Clerk.*

73 & 74 United States Circuit Court of Appeals for the First Circuit, October Term, 1915.

No. 1102.

ROBERT H. GARDINER, Trustee, Claimant-Appellant,
v.
WM. S. BUTLER & COMPANY, INC., et al., Appellees.

Appeal from the District Court of the United States for the District of Massachusetts.

Before Putnam, Bingham, and Brown, JJ.

Opinion of the Court.

December 9, 1915.

Per CURIAM:

This case is concluded, so far as we are concerned, by our decision in Wm. Filene's Sons Co. v. Weed, passed down at our present session, which two cases were heard practically simultaneously.

The judgment of the District Court is affirmed, with interest; and the appellees recover their costs of appeal.

PUTNAM, *J.*:

I concur in the result. The District Court applied to this case the rule of Slocum v. Soliday, 183 Fed. Rep. 410, 412. I do not know

whether the case is governed by this rule or not; but, in the absence of authorities otherwise, I feel bound by it. The application of this case cuts up all the further reasoning contained in this opinion of the court. Therefore, I concur that the case is governed by Slocum v. Soliday, and decline to enter into further discussion.

75 On April 22, 1915, Honorable Arthur L. Brown, District Judge, was assigned to sit in this case. On the same day, to wit, April 22, 1915, this case came on to be heard before Honorable William L. Putnam and Honorable George H. Bingham, Circuit Judges, and Honorable Arthur L. Brown, District Judge.

Thereafter, to wit, on the ninth day of December, A. D. 1915, the Opinion of the Court (page 73) was announced, a concurring opinion by Putnam, J., was filed and the following Final Decree was entered:—

Final Decree.

December 9, 1915.

This case came on to be heard April 22, 1915, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

On consideration whereof, It is now, to wit, December 9, 1915, here ordered, adjudged and decreed as follows: The decree of the District Court is affirmed, with interest, and the appellees recover their costs of appeal.

By the Court,

FRANCIS M. FOGARTY, *Clerk.*

Thereafter, to wit, January 6, 1916, the following Stipulation was filed:—

Stipulation.

[Filed in Circuit Court of Appeals January 6, 1916.]

It is hereby stipulated that the following shall be included in the record of the United States Circuit Court of Appeals for the First Circuit in the matter of the petition for a writ of certiorari to be filed in the Supreme Court of the United States by Robert S. Gardiner, Trustee:—

On November 13, 1912, a bankruptcy petition was filed in the District Court of the United States for the District of Massachusetts by certain creditors against Everybody's Store, Incorporated, the principal ground alleged being that Everybody's being
76 insolvent applied for the appointment of the receivers. The proceedings were contested by the receivers, who alleged solvency. A trial was held in said District Court, and on February 5, 1913, that court held in substance that Everybody's was not insolvent on November 7, 1912, the date of the appointment of the receivers. An appeal was taken, and on September 10, 1913, the

Circuit Court of Appeals for the First Circuit handed down an opinion (207 Fed. 752) affirming the decision of the District Court. A petition for a writ of certiorari was filed in the Supreme Court of the United States, and on November 3, 1913, an order denying this petition was entered.

WARREN, GARFIELD, WHITESIDE & LAMSON, *Attorneys for Appellant.*
CHOATE, HALL & STEWART,
Attorneys for Appellees.

On the same day, to wit, January 6, 1916, the following Order of Court was entered:—

Order of Court.

January 6, 1916.

It is ordered that the transcript of record herein be amended by adding thereto the stipulation of counsel filed this day.
By the Court.

FRANCIS M. FOGARTY, *Clerk.*

On the same day, to wit, January 6, 1916, the following Stipulation was filed:—

Stipulation.

[Filed in Circuit Court of Appeals January 6, 1916.]

In the above-entitled matter Robert H. Gardiner, Trustee, hereby represents that he proposes to file in the Supreme Court of the United States a petition for a writ of certiorari directed to
77 this court in this cause, and said Robert H. Gardiner, Trustee, hereby stipulates that he will file the said petition not later than February 1, 1916.

ROBERT H. GARDINER, *Trustee,*
By WARREN, GARFIELD, WHITESIDE & LAMSON, *Attorneys.*

On the same day, to wit, January 6, 1916, the following Order of Court was entered:—

Order of Court.

January 6, 1916.

Robert H. Gardiner, Trustee, having represented that he proposes to file a petition in the Supreme Court of the United States for a writ of certiorari directed to this court in this cause, and having stipulated that he would file the said petition not later than February 1, 1916, and it appearing that the appellees assent to the entry

of the following order, It is ordered that if the said Robert H. Gardiner, Trustee, shall file a petition for a writ of certiorari, as aforesaid, before February 1, 1916, that the mandate herein be stayed pending the said petition for a writ of certiorari and until the further order of this court.

By the Court.

FRANCIS M. FOGARTY, *Clerk.*

We assent to the entry of the foregoing order.

CHOATE, HALL & STEWART,
Attorneys for Wm. S. Butler & Company, Inc., Charles F. Weed et al., Receivers.

January 4, 1916.

78 *Clerk's Certificate.*

I, Francis M. Fogarty, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the printed pages numbered 1 to 77, inclusive, hereto prefixed, contain and are a true copy of the record and all proceedings to and including January 12, 1916, in the cause numbered and entitled, No. 1102. Robert H. Gardiner, Trustee, Claimant-Appellant, v. Wm. S. Butler & Company, Inc., et al., Appellees.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this twelfth day of January, A. D. 1916.

[Seal United States Circuit Court of Appeals, First Circuit.]

FRANCIS M. FOGARTY, *Clerk.*

79 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the First Circuit, Greeting:

Being informed that there is now pending before you a suit in which Robert H. Gardiner, Trustee of The Perry Real Estate Trust, is appellant, and William S. Butler & Company, Incorporated, et al., are appellees, No. 1102, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the — District of Massachusetts, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United
80 States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought be done.

Witness the Honorable Edward D. White, Chief Justice of the

United States, the second day of March, in the year of our Lord one thousand nine hundred and sixteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

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Return on Writ of Certiorari.

United States Circuit Court of Appeals for the First Circuit.

And now here the Judges of the United States Circuit Court of Appeals for the First Circuit make return of this writ by annexing hereto and sending herewith a certified copy of a stipulation between counsel for the respective parties in the cause in the Supreme Court of the United States wherein this writ of certiorari issued, "that the certified transcript of the record on file in the office of the Clerk of the Supreme Court of the United — may be taken as a return to the writ of certiorari issued by the Supreme Court of the United States to the Circuit Court of Appeals for the First Circuit in the case of Robert H. Gardiner, Trustee, petitioner, v. William S. Butler & Co., Inc., et al., respondents, No. 831, in the Supreme Court of the United States."

In testimony whereof, I, Francis M. Fogarty, Clerk of said United States Circuit Court of Appeals for the First Circuit, hereto set my hand and affix the seal of said court, at Boston, in said First Circuit, this sixth day of March, A. D. 1916.

[Seal United States Circuit Court of Appeals, First Circuit.]

FRANCIS M. FOGARTY, *Clerk.*

[Endorsed:] File No. 25,114. Supreme Court of the United States, October Term, 1915. No. 831. Robert H. Gardiner, Trustee, etc., vs. William S. Butler & Company, Inc. Writ of Certiorari.

82 United States Circuit Court of Appeals for the First Circuit.

No. 1102.

ROBERT H. GARDINER, Trustee, Appellant,
v.
WILLIAM S. BUTLER & CO., INC., et al., Appellee.

(Filed March 6, 1916.)

In the above-entitled cause it is hereby stipulated that the certified transcript of the record on file in the office of the Clerk of the Supreme Court of the United States may be taken as a return to the writ of certiorari issued by the Supreme Court of the United States to the Circuit Court of Appeals for the First Circuit in the case of Robert H. Gardiner, Trustee, petitioner, v. William S. Butler & Co.,

Inc., et al., respondents, No. 831, in the Supreme Court of the United States.

WARREN, GARFIELD, WHITESIDE, & LAMSON,
BENTLEY W. WARREN,
ALEXANDER WHITESIDE,
HOWARD STOCKTON, JR.,
Attorneys for Robert H. Gardiner, Trustee.
CHOATE, HALL & STEWART,
CHARLES F. CHOATE, JR.,
FREDERICK H. NASH,
Attorneys for William S. Butler & Co., Inc., et al.

A true copy:
Attest:

[Seal United States Circuit Court of Appeals, First Circuit.]

FRANCIS M. FOGARTY, *Clerk.*

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 3/6/1916. F. M. F.]

83 [Endorsed:] File No. 25,114. Supreme Court U. S., October term, 1915. Term No. 831. Robert H. Gardiner, Trustee, etc., Petitioner, vs. William S. Butler & Co., Inc. Writ of certiorari and return. Filed March 8, 1916.

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Supreme Court of the United States

OCTOBER TERM, 1915.

ROBERT H. GARDINER,
TRUSTEE OF THE PERRY REAL ESTATE TRUST,
Petitioner,

v.

WILLIAM S. BUTLER & COMPANY, INC.,
EVERYBODY'S STORE, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:—

Respectfully represents your petitioner, Robert H. Gardiner, Trustee:

1. That he is Trustee of the Perry Real Estate Trust, under a declaration of trust dated October 1, 1904, duly recorded in the Registry of Deeds for the County of Suffolk and Commonwealth of Massachusetts.

2. That he is the owner as such Trustee of certain real estate in Boston, Massachusetts, which he leased to the respondent, William S. Butler & Company, Inc., by lease dated December 19, 1910, and duly recorded in said Registry of Deeds, for a term of nine years and four months from January 1, 1911. Said lease is fully set forth in the

Record, pp. 36–42, and contained the following provisions (omitting portions which are not germane):

> "This lease is made on condition also that if the lessee shall neglect or fail to perform or observe any of the covenants herein contained . . . or . . . if a receiver . . . shall be appointed to take charge of any part of the property of or to wind up the affairs of the lessee . . . then the lessor lawfully may immediately or at any time thereafter, and without demand or notice, enter into and upon the demised premises or any part thereof in the name of the whole and repossess the same as of his former estate and expel the lessee and those claiming through or under him . . . without prejudice to any remedies for arrears of rent or preceding breach of covenant, and upon entry as aforesaid the lessee's estate shall end. And the lessee covenants that in case of such termination . . . the lessee will, at the election of the lessor, which election may be made or changed at any time, either (*a*) pay to the lessor sums equal to the rent and other payments herein named at the same times and in the same installments or, if the premises shall have been re-let, sums equal to the difference between the aforesaid and the sums actually received by the lessor in proportionate installments as liquidated damages for so much of the unexpired term as is represented by such installments; or (*b*) pay to the lessor as damages a sum which at the time of such termination or at the time to which installments of liquidated damages shall have been paid, represents the difference between the rental value of the premises and the rent and other payments herein named for the residue of the term; or (*c*) indemnify the lessor against loss of rent and other payments herein named from the time of such termination or from the time to which installments of liquidated damages shall have been paid during the residue of the term."

This lease was assigned by William S. Butler & Company, Inc., to the respondent Everybody's Store, Inc., on September 30, 1912 (Record, p. 43).

3. That on May 27, 1913, he became the owner as such Trustee of certain other real estate in said Boston, and became entitled to the rights of the lessor under a lease of such other real estate dated April 10, 1911, duly recorded in said Registry of Deeds, from one Russell to said William S. Butler & Company, Inc., for a term ending March 31, 1921. This lease was also assigned by William S. Butler & Company, Inc., to Everybody's Store, Inc., on September 30, 1912. This lease contained the following provision (Record, p. 36):

> ". . . upon failure by the lessee to perform or observe the covenants herein by it to be performed or observed, or in case of the lessee's bankruptcy or insolvency, the lessor may thereupon enter the demised premises and repossess the same as of his former estate, without prejudice to such other remedies as he may have against the lessee."

4. On November 7, 1912, a bill of complaint (Record, p. 2) was filed against the respondent, William S. Butler & Company, Inc., in the District Court of the United States for the District of Massachusetts, and on that date by consent of that company, receivers were appointed for said company by said Court (Record, p. 6). On the same date said receivership was extended to Everybody's Store, Inc., on its own petition and receivers were appointed for said company by said Court (Record, p. 10). Said receivers in each case were appointed to continue the business and conserve the assets of the companies, and there is nothing contained in the decrees appointing the various receivers conferring any power on them to wind up such companies, or indicating that winding up was contemplated.

The receivers of Everybody's Store, Inc., occupied the premises covered by both leases until December 30, 1912, paying rent agreed upon. Both sets of receivers elected not to affirm the two leases in December, 1912 (Record, pp. 54–55).

5. On November 11, 1912, said District Court entered an order that all creditors of William S. Butler & Company, Inc., present their claims, made up as of November 7, 1912, on or before January 1, 1913 (Record, pp. 12–13), and on September 11, 1913, said District Court entered an order requiring creditors of Everybody's Store, Inc., to present their claims, made up as of November 7, 1912, on or before October 1, 1913 (Record, pp. 22 and 23).

The time for proving claims against both companies was extended by various orders of the Court to December 12, 1913 (Record, pp. 13, 18, 19, 48, and 49).

All the assets of both companies have been sold and converted into cash under orders of the Court, and in neither case is there sufficient to pay creditors in full, even though the claims of your petitioner are not allowed (Record, p. 55).

6. Your petitioner entered upon the premises and terminated the lease dated December 19, 1910, on October 1, 1913, and the lease dated April 10, 1911, on June 16, 1913. The reason for this delay by your petitioner in terminating these leases was that the receivers of Everybody's Store, Inc., on the ground that that company was solvent, were defending a bankruptcy petition filed against it on November 13, 1912. That petition was finally dismissed on that ground by the Circuit Court of Appeals for the First Circuit on September 10, 1913 (Record, pp. 75–76). The result was that your petitioner had reason to believe he had an assignee of both leases which was solvent.

7. Your petitioner has filed two claims on said leases against each respondent.

These claims are made up as follows:

Under the lease dated December 19, 1910, your petitioner seeks to prove against each company for the rent reserved and other payments which the lessee was required to make from November 1, 1912, to October 1, 1913, the date of termination, less amounts received during that period.

He also seeks to prove for the rents reserved, etc., from October 1, 1913, during the remainder of the term, after deducting actual payments received and the estimated rental value of the premises for that period (Record, pp. 25–34, 55–56).

Under the lease dated April 10, 1911, your petitioner seeks to prove against both companies the amount of rent from the date of the acquisition of the property by your petitioner to the end of the term, less the estimated rental value of the premises for that period (Record, p. 56).

8. On December 15, 1913, said District Court referred certain disputed claims against both respondents to a special master, to hear the parties and their evidence, and report to the Court thereon (Record, pp. 46, 49, and 50). As appears in Exhibit C, Record, pp. 47 and 48, and Exhibit C, Record, p. 50, and by stipulations, Record, pp. 48 and 51, the claims of your petitioner were included in these orders of the Court.

Said special master reported in part as follows on these claims (Record, p. 56):

> "It seemed to me proper, before hearing the parties upon the question of damages, to report to the Court the question whether under the circumstances of this case the claimant has any provable claim for any damages sustained by him."

9. The questions of law involved were heard by said District Court, and on October 31, 1914, Dodge, J., handed down an opinion (Record, pp. 58 through 62) in which he stated in substance that your petitioner was not entitled under either lease to share in the distribution of the estate of either respondent, except to the extent of $213.89, being the rent due from November 1 through November 7, 1912, prior to the appointment of receivers. He disallowed the

balance of the claims, and on December 12, 1914 (Record, p. 57), a decree was entered in accordance with the opinion.

This decision was appealed from (Record, p. 62).

Said appeal was heard by the United States Circuit Court of Appeals for the First Circuit, and on December 9, 1915, said Court handed down an opinion, refusing to allow the claims (Record, p. 73), and referring to its opinion in the case of *Wm. Filene's Sons Co.* v. *Weed.* (As this Filene case is also before your Honorable Court on a petition for certiorari, the opinion in that case is not made a part of the record in this.) A final decree was entered on December 9, 1915 (Record, p. 75).

Question involved and Grounds on which Your Petitioner bases this Application.

The sole question involved is whether, in a receivership in equity of an insolvent corporation in the District Court, where the Court orders the assets distributed to creditors, a creditor having a claim for rent reserved and a claim for damages for breach of a lease is entitled to participate in the assets, where the rent reserved became due and the breach occurred after the appointment of the receivers but before the time prescribed by the Court for filing proofs of claims had expired, and where accrued rent reserved and the damages were fixed and readily determinable before such time.

The Circuit Court of Appeals for the First Circuit held in this case that such a creditor is not entitled to participate in the assets. Your petitioner contends that said decision is erroneous and that it should be reviewed by this Court for the following reasons:

(*a*) Because said decision is inconsistent with the principles laid down by the Circuit Courts of Appeals for the

Second, Third, Fifth, and Seventh Circuits in the following cases:

Pennsylvania Steel Co. et al. v. *New York City Railway Co. et al.*, 198 Fed. 768 (C. C. A. 2d Circuit);

Ludlow v. *Pugh*, 213 Fed. 450 (C. C. A. 3d Circuit);

Martin v. *Orgain*, 174 Fed. 772 (C. C. A. 5th Circuit);

In re Desnoyers Shoe Co., 227 Fed. 401 (C. C. A. 7th Circuit).

(*b*) Because said decision is contrary to the rule in such cases laid down by the Supreme Judicial Court of Massachusetts.

Deane v. *Caldwell*, 127 Mass. 242.

(*c*) Because said decision is inconsistent with the principles laid down by this Court in the cases of:

International Trust Co. v. *Weeks*, 203 U. S. 364;
Chemical National Bank v. *Hartford Deposit Co.*, 161 U. S. 1.

(*d*) Because said decision is contrary to the true principles of law and equity pertaining to the question involved.

(*e*) Because the question involved is one of great importance, involving the rights of all lessors of real estate, and the effect of all leases in cases of winding up in equity by receivership, or in bankruptcy.

10. Your petitioner makes a part of this petition the reported decisions hereinbefore referred to, and submits a certified copy of the record of said Circuit Court of Appeals for the First Circuit, of the decree therein and of the opinion of said Court, and a brief in support of this petition.

WHEREFORE your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the First Circuit commanding said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein, entitled *Robert H. Gardiner, Trustee, Claimant, Appellant* v. *William S. Butler & Company, Inc., et al., Appellees, No. 1102*, to the end that the said case may be reviewed and determined by this Court as provided by law, and that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate.

And your petitioner will ever pray—

ROBERT H. GARDINER, *Trustee of the Perry Real Estate Trust*

By

BENTLEY W. WARREN
ALEXANDER WHITESIDE
HOWARD STOCKTON JR.
Counsel.

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF SUFFOLK } ss.

Bentley W. Warren being duly sworn, says that he is one of the counsel for Robert H. Gardiner, Trustee, the petitioner, that he prepared the foregoing petition, and that the allegations thereof are true as he verily believes.

Subscribed and sworn to before me, this twenty seventh day of January 1916.

RALPH C. PIPER
Notary Public.

[NOTARIAL SEAL]

Supreme Court of the United States

OCTOBER TERM, 1915.

ROBERT H. GARDINER,
TRUSTEE OF THE PERRY REAL ESTATE TRUST,
Petitioner,

v.

WILLIAM S. BUTLER & COMPANY, INC.,
EVERYBODY'S STORE, INC.,
Respondents.

BRIEF OF PETITIONER ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

FACTS.

The petitioner, Robert H. Gardiner, is Trustee of the Perry Real Estate Trust, under a declaration of trust dated October 1, 1904, duly recorded in the Registry of Deeds for Suffolk County, Massachusetts, and is the owner as such Trustee of certain real estate in Boston, Massachusetts, which he leased to the respondent William S. Butler & Company, Inc., by lease dated December 19, 1910, and duly recorded in said Registry of Deeds, for a term of nine years

and four months from January 1, 1911. Said lease is fully set forth in the Record, pp. 36–42, and contained the following provisions (omitting portions which are not germane):

> "This lease is made on condition also that if the lessee shall neglect or fail to perform or observe any of the covenants herein contained . . . or . . . if a receiver . . . shall be appointed to take charge of any part of the property of or to wind up the affairs of the lessee . . . then the lessor lawfully may immediately or at any time thereafter, and without demand or notice, enter into and upon the demised premises or any part thereof in the name of the whole and repossess the same as of his former estate and expel the lessee and those claiming through or under him . . . without prejudice to any remedies for arrears of rent or preceding breach of covenant, and upon entry as aforesaid the lessee's estate shall end. And the lessee covenants that in case of such termination . . . the lessee will, at the election of the lessor,which election may be made or changed at any time, either (*a*) pay to the lessor sums equal to the rent and other payments herein named at the same times and in the same installments or, if the premises shall have been re-let, sums equal to the difference between the aforesaid and the sums actually received by the lessor in proportionate installments as liquidated damages for so much of the unexpired term as is represented by such installments; or (*b*) pay to the lessor as damages a sum which at the time of such termination or at the time to which installments of liquidated damages shall have been paid, represents the difference between the rental value of the premises and the rent and other payments herein named for the residue of the term; or (*c*) indemnify the lessor against loss of rent and other payments herein named from the time of such termination or from the time to which installments of liquidated damages shall have been paid during the residue of the term."

This lease was assigned by William S. Butler & Company, Inc., to the respondent Everybody's Store, Inc., on September 30, 1912 (Record, p. 43).

On May 27, 1913, the petitioner became the owner as such Trustee of certain other real estate in said Boston, and became entitled to the rights of the lessor under a lease of such other real estate dated April 10, 1911, duly recorded in said Registry of Deeds, from one Russell to said William S. Butler & Company, Inc., for a term ending March 31, 1921. This lease was also assigned by William S. Butler & Company, Inc., to Everybody's Store, Inc., on September 30, 1912. This lease contained the following provision (Record, p. 36):—

> ". . . upon failure by the lessee to perform or observe the covenants herein by it to be performed or observed, or in case of the lessee's bankruptcy or insolvency, the lessor may thereupon enter the demised premises and repossess the same as of his former estate, without prejudice to such other remedies as he may have against the lessee."

On November 7, 1912, a bill of complaint (Record, p. 2) was filed against the respondent, William S. Butler & Company, Inc., in the District Court of the United States for the District of Massachusetts, and on that date, by consent of that company, receivers were appointed for said company by said Court (Record, p. 6). On the same date said receivership was extended to Everybody's Store, Inc., on its own petition and receivers were appointed for said company by said Court (Record, p. 10). Said receivers in each case were appointed to continue the business and conserve the assets of the companies, and there is nothing contained in the decrees appointing the various receivers conferring any power on them to wind up such companies, or indicating that winding up was contemplated.

The receivers of Everybody's Store, Inc., occupied the premises covered by both leases until December 30, 1912, paying rent agreed upon. Both sets of receivers elected not to affirm the two leases in December, 1912 (Record, pp. 54–55).

On November 11, 1912, said District Court entered an

order that all creditors of William S. Butler & Company, Inc., present their claims, made up as of November 7, 1912, on or before January 1, 1913 (Record, pp. 12–13), and on September 11, 1913, said District Court entered an order requiring creditors of Everybody's Store, Inc., to present their claims, made up as of November 7, 1912, on or before October 1, 1913 (Record, pp. 22 and 23).

The time for proving claims against both companies was extended by various orders of the Court to December 12, 1913 (Record, pp. 13, 18, 19, 48, and 49).

All the assets of both companies have been sold and converted into cash under orders of the Court, and in neither case is there sufficient to pay creditors in full, even though the claims of your petitioner are not allowed (Record, p. 55).

Your petitioner entered upon the premises and terminated the lease dated December 19, 1910, on October 1, 1913, and the lease dated April 10, 1911, on June 16, 1913. The reason for this delay by your petitioner in terminating these leases was that the receivers of Everybody's Store, Inc., on the ground that that company was solvent, were defending a bankruptcy petition filed against it on November 13, 1912. That petition was finally dismissed on that ground by the Circuit Court of Appeals for the First Circuit on September 10, 1913 (Record, pp. 75–76). The result was that your petitioner had reason to believe he had an assignee of both leases which was solvent.

Your petitioner has filed two claims on said leases against each respondent.

These claims are made up as follows:

Under the lease dated December 19, 1910, your petitioner seeks to prove against each company for the rent reserved and other payments which the lessee was required to make from November 1, 1912, to October 1, 1913, the date of termination, less amounts received during that period. He also seeks to prove for the rents reserved, etc., from

October 1, 1913, during the remainder of the term, after deducting actual payments received and the estimated rental value of the premises for that period (Record, pp. 25–34, 55–56).

Under the lease dated April 10, 1911, your petitioner seeks to prove against both companies the amount of rent from the date of the acquisition of the property by your petitioner to the end of the term, less the estimated rental value of the premises for that period (Record, p. 56).

On December 15, 1913, said District Court referred certain disputed claims against both respondents to a special master, to hear the parties and their evidence, and report to the Court thereon (Record, pp. 46, 49, and 50). As appears in Exhibit C, Record, pp. 47 and 48, and Exhibit C, Record, p. 50, and by stipulations, Record, pp. 48 and 51, the claims of your petitioner were included in these orders of the Court.

Said special master reported in part as follows on these claims (Record, p. 56):—

> "It seemed to me proper, before hearing the parties upon the question of damages, to report to the Court the question whether under the circumstances of this case the claimant has any provable claim for any damages sustained by him."

The questions of law involved were heard by said District Court, and on October 31, 1914, Dodge, J., handed down an opinion (Record, pp. 58 through 62) in which he stated in substance that your petitioner was not entitled under either lease to share in the distribution of the estate of either respondent, except to the extent of $213.89, being the rent due from November 1 through November 7, 1912, prior to the appointment of receivers. He disallowed the balance of the claims, and on December 12, 1914 (Record, p. 57), a decree was entered in accordance with the opinion. This decision was appealed from (Record, p. 62).

Said appeal was heard by the United States Circuit Court of Appeals for the First Circuit, and on December 9, 1915, said Court handed down an opinion, refusing to allow the claims (Record, p. 73), and referring to its opinion in the case of *Wm. Filene's Sons Co.* v. *Weed.* (As this Filene case is also before your Honorable Court on a petition for certiorari, the opinion in that case is not made a part of the record in this.) A final decree was entered on December 9, 1915 (Record, p. 75).

Question involved and Grounds on which your Petitioner bases his Application.

The sole question involved is whether, in a receivership in equity of an insolvent corporation in the District Court, where the Court orders the assets distributed to creditors, a creditor having a claim for rent reserved and a claim for damages for breach of a lease is entitled to participate in the assets, where the rent reserved became due and the breach occurred after the appointment of the receivers but before the expiration of the time prescribed by the Court for filing proofs of claims, and where accrued rent reserved and the damages were fixed and readily determinable before such time for filing proofs of claims had expired.

The majority opinion of the Circuit Court of Appeals for the First Circuit disallowing the claims of your petitioner is a *per curiam* opinion (Record, p. 73) and states that the case is concluded by *Wm. Filene's Sons Co.* v. *Weed*, a case on very similar facts decided practically simultaneously with this, which is also now before this Court on a petition for certiorari. The opinion of the majority of

the Court, by Brown, J., in *Wm. Filene's Sons Co.* v. *Weed*, must therefore be considered as applying to our case.

It is perhaps superfluous to go into the merits of the case on this petition, but a very brief summary of Judge Brown's opinion in the Filene case, and of our reasons for contending it is erroneous, will make the case somewhat clearer:—

Firstly, Judge Brown says that the fact that these leases were recorded does not help but hurts the petitioner, as it gives other creditors notice that no claim of this sort will arise.

This, we submit, with all due respect for the learned Judge, is as good an example of reasoning in a circle as could possibly be found. Other creditors had notice of the nature of the petitioner's claim; therefore, the petitioner cannot recover, the Court holds. The learned Judge seems to think that such other creditors must have anticipated the decision of the Circuit Court of Appeals, and therefore have known that the claims would not be allowed. It is submitted that this reasoning is absolutely erroneous, and that the fact that these leases were recorded is notice to other persons giving credit to the company, and to the receivers who represent them, of these claims.

Secondly, Judge Brown states that the covenant for payment of damages was not entered into upon the faith of the lessee's assets.

There is absolutely no evidence that this is so, and it cannot be implied from the covenant itself. If the lessor did not enter into this covenant on the faith of the lessee's assets, why did he enter into it? The lessees are corporations, and if divested of their assets are, of course, mere shells.

Thirdly, Judge Brown argues that other creditors here were entitled to disregard the mere possibility of a future debt coming into being after the filing of a creditors' bill.

The covenants, however, were in existence before the filing of the bill, and as the leases were recorded the other creditors had notice of them,—notice of executory con-

tracts which might ripen into claims, based as much upon the assumption of solvency as contracts of merchandise creditors. Furthermore, these receiverships were by *consent* of the respondents (Record, pp. 5, 7, 8, and 9), and Judge Brown's statement that creditors "have asserted their right to the assets" is hardly apt.

Fourthly, he states that the rule is the same in equity and in bankruptcy.

In this statement he is in accord with Judge Putnam, who in his minority opinion said that he felt bound by the decision of the Circuit Court of Appeals for the First Circuit in *Slocum* v. *Soliday*, 183 Fed. 410 (where a claim like the petitioner's was disallowed in *bankruptcy*), though he admitted that he did not know whether the case was governed by this rule or not (Record, p. 73). We contend that courts of equity are in no way bound by the Bankruptcy Act, and should not follow it where the result, as in our case, leads to injustice. Furthermore, as we shall show, there is a distinct conflict as to what is the bankruptcy rule.

We contend that the claims of the petitioner should have been allowed in full, that at any rate the claims of the petitioner should have been allowed in so far as they represent actual rent accrued and due at the time the proofs of claims were filed, and that the decision of the Circuit Court of Appeals for the First Circuit is erroneous, and should be reviewed, for the following reasons:—

I.

Said Decision is in Direct Conflict with the Decisions of the Circuit Court of Appeals for the Second Circuit.

In *Pennsylvania Steel Company et al.* v. *New York City Railway et al.*, 198 Fed. 721 (C. C. A. 2d Circuit, 1912), in the portion thereof known as the "Express Company's

Appeal," at page 735, the facts briefly summarized were as follows: The Metropolitan Railway Company had a written contract with an express company, by which it granted to the latter the exclusive rights of moving express matter over its street railway system for a period of twenty years. This contract was later assigned by the Metropolitan Railway Company to the City Railway Company. On September 24, 1907, receivers were appointed for the City Railway Company. The receivers continued to fulfil the contract until February 28, 1908, on which date they notified the express company that they would not adopt the contract. The express company filed a proof of claim against the estate of the Railway Company for damages for breach of this contract, and the Circuit Court of Appeals for the Second Circuit held that the claims should be allowed for such damages as might be established upon hearing. In the course of this opinion the Court uses the following language:—

> *Page 738.* "Equitable considerations must govern and the underlying ones are these: The assets of an insolvent corporation belong to its creditors. Although not, strictly speaking, a trust fund, they partake of the nature of one. The administration of the estate is for their benefit. Its purpose is to make an equitable distribution. Equality is equity. Debts and liabilities, present and future, certain and contingent, stand upon the same *equitable* basis. If delays were unimportant, the settlement of estates would be kept open until contingencies should become certainties. If courts were omniscient, distribution would always be through the resolving of all contingencies and the ascertainment of the present worth of all demands. But courts cannot look with certainty into the future. Delays are important. The settlement of estates cannot be held open to await contingencies. Orderly administration requires that at some reasonably speedy time all claims should be so liquidated as to afford a basis for distribution."

Pages 739 and 740. "The real inquiry in getting at a basis for the distribution of an insolvent estate is whether the claims are reduced to dollars and cents. If they are so reduced or can be so reduced by the application of recognized principles they are entitled to share. If they are not they cannot share. And this not at all for any reason affecting their merits nor strictly speaking because they are contingent, but because they are uncertain. So, without laying stress upon the question whether claims are (1) past due, (2) immature, or (3) contingent, the real way we should divide them with respect to the question of provability is into these two classes:

(1) Claims of which the worth or amount can be determined by recognized methods of computation at a time consistent with the expeditious settlement of the estates;

(2) Claims which are so uncertain that their worth cannot be so ascertained.

The second class of claims cannot be proved. They may be highly meritorious, but they cannot share in the estate because their amounts cannot be ascertained.

The first class of claims ought to be proved and share in the estate and this whether they are overdue accounts, immature notes, or *claims for damages for breach of contract coinciding with or following the receivership.* It is impossible to point to any equitable ground which would justify a court of equity in excluding the holders of any of such claims from sharing in the estate of their debtor." (Our italics.)

Pages 741 and 742. "Under the foregoing decision creditors were permitted to prove claims which, although not matured and certain at the time of the appointment of the receivers, became such before any order of distribution. We think this rule very nearly correct, although it probably goes too far in permitting the proof of claims up to the time of distribution. All claims ought to be in before the accounts are made up for distribution, and there should be no opportunity for uncertainty, delay or expense in reopening and recasting them. A narrower rule can be adopted which would obviate any difficulty in this regard and

which would be simple, equitable and workable. It is this: Claims which when presented within the time limited by the court for their presentation are certain or are capable of being made certain by recognized methods of computation, should be allowed. Claims which are not then certain should be disallowed because they afford no basis for making dividends. But there is no equitable reason why claims which are certain when presented and which are presented in time should have been certain at some arbitrary anterior period."

Page 745. "Manifestly the claimant was entitled to recover the value of its contract. Manifestly also the value of its contract was what it would have made by its performance. Gains prevented, when fairly shown, are recoverable as damages for breach of contract. But future gains must be measured by past performance. Consequently profits under a contract for a reasonable period before its breach may be shown to establish gains prevented by its breach. These principles are clearly stated and the necessity for latitude in the reception of proof of damage are pointed out in the opinion of the New York Court of Appeals in *Wakeman* v. *Wheeler & Wilson Mfg. Co.*, 101 N. Y. 205, 209, 4 N. E. 264, 266 (54 Am. Rep. 676)."

Compare this decision with the decision of the Court in the First Circuit in our case.

The Court in the Second Circuit holds that in a receivership in equity equitable rules as to what claims are provable should be followed, and that creditors should be "permitted to prove claims which, although not matured and certain at the time of the appointment of the receivers, became such before any order of distribution."

On the other hand the Court for the First Circuit holds that our case is governed by the Bankruptcy Act as construed in *Slocum* v. *Soliday*, 183 Fed. 410 (C. C. A. 1st Circuit), and that the claim of the petitioner must be disallowed because not due at the time of the appointment of the receivers.

The respondents possibly will contend that the note at the bottom of page 744 of 198 Fed. in *Pennsylvania Steel Company et al.* v. *New York City Railway et al.*, supra, distinguishes the case before it from cases of leases. This note is as follows:—

> "It should be observed that there is no analogy between a case like the present one and the bankruptcy cases relating to leases of real estate like *In re Roth & Appel*, 181 Fed. 667, 104 C. C. A. 649, 31 L. R. A. (N. S.) 270. In those cases it is held that the estate in lands which passes to a lessee is not divested by his bankruptcy when the trustee does not elect to assume the lease. Under such conditions the bankrupt lessee retains the lease upon the same footing as before. In other words the situation of the leasehold interest is as if nothing had happened. The present case is more like that of the bankruptcy of a lessor whose trustee drives the tenant out of possession and then insists that the lease has not been broken."

It is submitted, however, that the intention of the Court was not to distinguish between leases and other executory contracts, but between the rule in *bankruptcy* as laid down by the courts in the Second Circuit, and the rule in *equity*. Under the bankruptcy decisions in the First and Second Circuits (*Slocum* v. *Soliday*, 183 Fed. 410—C. C. A. 1st Circuit; *In re Roth & Appel*, 181 Fed. 667—C. C. A. 2d Circuit), in order to render a claim on an executory contract provable in bankruptcy, it is necessary to hold that bankruptcy constituted an anticipatory breach, and that therefore the debt was due when the proceedings were commenced. In the express company case above cited, however, there is no suggestion of any anticipatory breach, and there was in fact no breach of the contract whatsoever until the receivers of the railway, several months after their appointment, refused to continue the contract. Under the *bankruptcy* rule followed in the First and Second Circuits, there-

fore, the claim of the express company would not have been allowed.

The respondents will possibly further contend that the portion of *Pennsylvania Steel Company et al.* v. *New York City Railway et al.*, supra, applicable hereto is not the "Express Company's Appeal," but the "Crosstown Company's Appeal," at page 756. That, however, was a case of breach of a 999-year lease, and the Court held that damages were too conjectural because of the impossibility of determining the rental value for the remainder of the term. In our case, we do not have this difficulty.

It is submitted that the decision in *Pennsylvania Steel Company et al.* v. *New York City Railway et al.*, supra, is inconsistent with the decision of the Circuit Court of Appeals for the First Circuit in our case, and that this Court should take jurisdiction of our case by means of a writ of certiorari, in order to define the correct rule to be followed in the future.

II.

Said Decision is in Direct Conflict with the Decisions of the Circuit Court of Appeals for the Third, Fifth and Seventh Circuits.

Your petitioner contends that the Circuit Court of Appeals for the First Circuit was wrong in holding the bankruptcy rule, as laid down in the First Circuit in *Slocum* v. *Soliday*, applicable to this case, and contends that it should have followed the equitable rule set forth in *Pennsylvania Steel Co. et al.* v. *New York City Railway Co. et al.*, supra. The bankruptcy rule so laid down is based on the language of a statute which does not govern a court of equity. *Union Trust Co.* v. *Souther*, 107 U. S. 591. If, however, it be held that the bankruptcy rule is applicable, it is submitted that there is a direct conflict of authority as to this rule between

the Circuit Court of Appeals for the First Circuit and the Circuit Courts of Appeals for the Third, Fifth and Seventh Circuits.

In the Third Circuit the most recent decision by the Circuit Court of Appeals on the point is *Ludlow* v. *Pugh*, 213 Fed. 450, which affirms *In re Keith-Gara Co.*, 203 Fed. 585 (D. C. E. D. Penn. 1913), and adopts the language of the District Court as its own. In that case a lease contained a provision that if the lessee should become a bankrupt the whole rent for the unexpired term should become at once due and payable and also be entitled to priority. The lessee became bankrupt and the question arose as to the validity of a claim for this rent by the lessor. The Court held that the claim was entitled to priority if it was a "debt" provable in bankruptcy, and then after stating that "the decisions diverge and cannot be reconciled" held that the claim was provable.

Another important case in the Third Circuit is *In re Caloris Mfg. Co.*, 179 Fed. 722 (D. C. E. D. Penn. 1910). This, it is true, is only a district court case, but it is cited with approval in *In re Keith-Gara Co.*, supra, and in a number of cases in the Circuit Court of Appeals for the Third Circuit, and undoubtedly represents the law in that Circuit.

The question involved in that case is practically identical with ours except that it involves the validity of a claim *in bankruptcy* for breach of a lease. The term began June 1, 1909, and was for over four years at a rental of $4,500 per annum. The lessee was petitioned into bankruptcy on June 15. The lessee paid the June rent, but no other rent was

paid, and on August 5 the premises were relet at $3,200 per annum. On February 23, 1910, the lessor filed its proof of debt for $6,166.67, being the difference between the old rent and the new, and the Court holds that the claim should be allowed.

In the course of his opinion, Judge McPherson said, at page 723:—

> . . . "The referee disallowed the claim on the authority of *Re Roth and Appel* (D. C.), 174 Fed. 64, and the decision undoubtedly sustains his position. I cordially agree with Judge Hough that the conflicting decisions on this subject are in a state of 'hopeless confusion,' and that an authoritative decision is much to be desired. Certainly, neither he nor I can give it, and *it will probably need the intervention of the Supreme Court before the inferior tribunals will know what rule to obey.* Meanwhile, however, I think the principle of *Moch* v. *Market Street Bank,* 107 Fed. 897, 47 C. C. A. 49, governs the District Courts of this circuit, and requires them to hold that, even although the landlord's claim in the present case was not a fixed liability under Bankr. Act July 1, 1898, c. 541, s. 63a (1), 30 Stat. 562 (U. S. Comp. St. 1901, p. 3447), when the petition was filed, it was liquidated within the year, and thus became provable as a claim founded upon a contract express or implied, under section 63a (4). The Case of Moch was followed in *Re Dunlop Carpet Co.* (D. C.) 163 Fed. 541, and I shall adhere to that ruling until its error is definitely established." (Our italics.)

The case of *Martin* v. *Orgain,* 174 Fed. 772 (C. C. A. 5th Circuit, 1909), is also inconsistent with the decision in our case. There, under a provision in a lease and by statute, a lessor was given a lien on property of his lessee on the leased premises, for rent due and to become due. The lessee became bankrupt, and it was held that the lessor

could enforce a lien for rent for one year after the date of bankruptcy.

It may be contended by the respondents that because there is a statutory lien in this case it is distinguishable from ours. No state statute, however, can create a lien enforceable in bankruptcy proceedings if the claim of the holder of the lien is one which would not be recognized by the bankruptcy courts. The claim in *Martin* v. *Orgain* was for future rents, and the decision of the Court upholding this claim is quite inconsistent with the decision of the Circuit Court of Appeals for the First Circuit in our case.

In the Seventh Circuit the most recent decision by the Circuit Court of Appeals on the point is *In re Desnoyers Shoe Co.*, 227 Fed. 401, where the facts were as follows:—

The United Shoe Machinery Company leased certain machinery to the Desnoyers Shoe Company. The lease contained the following provision: "If the lessee becomes insolvent or bankrupt,. . . . then . . . any or all leases of or licenses to use machinery then existing between the lessor or the lessee . . . shall, at the option of the lessor, cease and determine." There follow certain provisions for payments by the lessee in case of termination of the lease. The lessee became bankrupt, and five days afterwards the lessor gave notice that it had elected to terminate the leases. The question arose as to whether a claim of over $20,000 for the charges and payments above referred to was provable against the bankrupt estate. The Court held that the claim was provable; that under the lease the lessor was given the right to determine whether or not bankruptcy should constitute an anticipatory breach; and that its election to terminate would be giving retroactive effect,—the result being that the claim was due at the time of bankruptcy, and therefore provable.

This decision, it is submitted, is directly in conflict with the decision in our case. In our case the Court held that the fact that the lessor was given an option to terminate in case of bankruptcy or receivership prevented any termination until such option was exercised, and therefore prevented any claim from becoming due until after the date of the receivership. The Court in the Seventh Circuit in the Desnoyers case, however, holds that though the claim is not actually due at the date of bankruptcy, yet the exercise of the option to terminate will be given retroactive effect. Illustrating the conflict of authorities on the subject, the case of *In re Jorolemon-Oliver Co.*, 213 Fed. 625 (C. C. A. 2d Circuit), on substantially similar facts, reaches a conclusion exactly opposite to the Desnoyers case.

III.

Said Decision is Contrary to the Rule in Such Cases Laid Down by the Supreme Judicial Court of Massachusetts.

Most of the cases in Massachusetts on the subject are cases in insolvency or under assignments for the benefit of creditors, and most of them are governed either by the strict Massachusetts insolvency statute, which provides that only debts due may be proved, or by the Bankruptcy Act, because of restrictions, in the particular assignment for the benefit of creditors, as to what claims shall be provable. Such cases are *Cotting* v. *Hooper Lewis & Co., Inc.*, 220 Mass. 273, where an assignment provided for distribution as if under the Bankruptcy Act, and *Shaw* v. *United Shoe Machinery Co.*, 220 Mass. 486, where an assignment provided for distribution in accordance with the Massachusetts insolvency statute. These cases are therefore distinguishable from ours.

The case of *Deane* v. *Caldwell*, 127 Mass. 242, however, is a case of a claim for rent against *the insolvent estate of a deceased person*, and this sort of a case is not governed by the Massachusetts insolvency statute applicable to living insolvents, and claims provable are not limited by statute to "debts due," but any "creditor" may present claims. In this case there was a five-year lease expiring in 1879. In February, 1876, the estate of the deceased lessee was represented insolvent in the Probate Court. In April, 1876, the lessor presented a claim for damages estimated at the difference between the rent reserved and the rental value for the rest of the term, and, if that should be disallowed, a claim for rent accrued up to the time of the presentation of the claim. In August, 1876, the administrators surrendered the lease, and this surrender was accepted by the lessor. Gray, C. J., holds that the plaintiff was entitled to prove for rents accrued up to the time of the actual presentation of proof of claim to the commissioner in insolvency, and that there is a distinction between claims of this nature against a living bankrupt or insolvent and those against a deceased person's estate. In the case of claims against a deceased person there being no debtor surviving, if claims of this nature were not provable they would be lost. So in *Deane* v. *Caldwell*, supra, the lessor is allowed to prove for rent accrued up to the time of the presentation of the claim, but is not allowed to prove for future rent, because, according to the Court, there had been no breach of the covenant in the lease which would sustain an action either for rent or for damages. The surrender of the lease by the administrators and its acceptance by the lessor having been absolute, without reservation of any right to recover loss occasioned by being compelled to rent the premises at a reduced rental, it is held that the lease and all liability on the covenants thereof had terminated. Clearly, if at the time of the surrender of the lease a right had been reserved by the lessee to recover his losses based on the difference between

the rent reserved and the rental value of the premises for the remainder of the term, a claim for such losses would have been held by the Court to be provable. That this is the law in Massachusetts is further shown by a dictum in *Cotting* v. *Hooper Lewis & Co., Inc.*, supra. The Court says (220 Mass. 275):—

> "If the assignment contained no provisions as to the nature and character of the liabilities of the assignor, upon which dividends were payable, the question whether plaintiffs can participate would have to be determined as at common law. *Andrews* v. *Tuttle-Smith Co.*, 191 Mass. 461. *Smith* v. *Goodman*, 149 Ill. 75."

Andrews v. *Tuttle-Smith Co.*, 191 Mass. 461, has little to do with the question, but *Smith* v. *Goodman*, 149 Ill. 75, is a case exactly like ours, where a claim for rent similar to ours was allowed. The rule set forth in that case, therefore, would seem to represent the view of the Supreme Judicial Court of Massachusetts as lately as March 3, 1915, of what the common law is.

It is well settled in Massachusetts that claims like those of the petitioner are "debts," and that the covenants are enforceable against the lessee. *Woodbury* v. *Sparrell Print*, 187 Mass. 426. *Edmands* v. *Rust & Richardson Drug Co.*, 191 Mass. 123.

It is submitted that the Circuit Court of Appeals for the First Circuit should have followed these cases. In our case, as in *Deane* v. *Caldwell*, there is no statute applicable; in our case, as there, the claims will be "lost" if not allowed. In that case there was an absolute surrender of the lease without reservation of any right to damages, so no damages for breach of the lease are allowed; but in our case, on the contrary, there is a distinct reservation of the right to damages, and in the lease dated December 19, 1910, a covenant by the lessee to pay them, and therefore such damages should be allowed in addition to rent accrued.

IV.

Said Decision is Inconsistent with the Principles Laid Down by Your Honorable Court in International Trust Co. v. Weeks, 203 U. S. 364, and Chemical National Bank v. Hartford Deposit Co., 161 U. S. 1.

In *International Trust Co.* v. *Weeks*, 203 U. S. 364, the validity of a claim in many respects similar to that of your petitioner was questioned in proceedings for winding up an insolvent national bank. Under the terms of a lease to the bank the lessor had the right to re-enter for breach of covenant, and to relet the premises at the risk of the lessee, who was to remain responsible for the rent reserved for the residue of the term, less such amounts as the lessor actually realized. The bank became insolvent and a receiver was appointed, *and after the appointment of the receiver* the lessor entered for breach of condition. (See *Weeks* v. *International Trust Co.*, 125 Fed. 370, at 372 (C. C. A. 1st Circuit, 1903).) The Court held the claim invalid, because the lessor had unreasonably refused to relet the premises. In other respects, however, both this Court, and Judge Lowell in the Circuit Court of Appeals, appear to consider the claim valid, and make no point of the fact that there was no entry for breach of condition until after the appointment of the receiver.

In *Chemical National Bank* v. *Hartford Deposit Company*, 161 U. S. 1, the following state of facts arose. A national bank took a lease of banking rooms, dated November 18, 1892, for a period of 5 years from May 1, 1893, at an annual rental of $12,000, payable in equal monthly instal-

ments of $1,000 in advance. The first instalment of rent was due May 1, 1893, and this rent was not paid. On May 9, 1893, the bank became insolvent, and a national bank examiner took possession of its assets and of said premises. On July 21 a receiver was appointed and on July 27 he notified the lessor of his election to terminate said lease after July 31, 1893. He paid all the rent up to July 31, but no further rent was paid, and the premises remained vacant until May 1, 1894, when they were relet at a lower figure. The lessor brought an action of assumpsit in the Illinois state courts against the bank to recover damages for failure to pay rent, and judgment rendered in the sum of $9,000 by the Illinois Court was affirmed by the Supreme Court. One of the questions considered by this Court was whether the claim was an existing demand at the time of the suspension of the bank, and whether it was entitled to participate in the distribution of the assets. This Court holds that part of the claim, namely, the rent due on May 1, 1893, was an existing demand, and evidently considers that it made no difference that this part had been paid and that the rest of the claim was not an existing demand. In other words,this Court holds that the entire claim was proper, even though the unpaid balance was neither due nor existing at the time of the appointment of the receiver.

The Circuit Court of Appeals for the First Circuit has disregarded these decisions and has held in our case that a similar claim of your petitioner cannot be allowed, because none of it was due before the appointment of the receiver.

V.

Said Decision is Contrary to the True Principles of Law and Equity Pertaining to the Question Involved.

The Circuit Court of Appeals for the First Circuit says in this case that a lease is a peculiar transaction standing by itself apart from other executory contracts, because the lessor, upon a breach, still has the premises, and can relet them, and therefore does not rely upon the assets of the insolvent lessee, and should not be allowed to compete with other creditors who did rely on such assets. But how does a lease differ from any other executory contract? In the case of a contract with an employee for personal services the employee is allowed to file a claim for damages against the estate of his insolvent employer though he retains control of the subject matter of the contract,—his services. The merchant who has contracted to sell goods may file a claim for the loss he sustains by the insolvency, though he retains the goods. This is held by the same Circuit Judge (Dodge, J.), who disallowed the claim of your petitioner in the District Court, in a convincing opinion in *Curtis* v. *Walpole Tire & Rubber Co.*, 227 Fed. 698 (D. C. Mass. 1914). On comparison of the opinion in that case with the opinion in the case at bar, there is apparently only one distinction in the mind of the Court: In that case the claim is for damages, but in our case, the Court says, the claim is for "accelerated rentals." This distinction, however, is non-existent. The claims of the petitioner are not for "accelerated rentals," but for damages because of the loss of the leases. In the case of the lease dated April 10, 1911, these damages are computed according to the regular rule, being the difference between the rent reserved and the rental value of the premises for the remainder of the term. In the case of the lease dated December 19, 1910, the damages are computed

in the same way, *by express agreement* contained in the lease (Record, p. 41). The lessee has *agreed* to pay as *damages* the difference between the rent reserved and the rental value. A person who makes a contract should be bound by its terms, and agreements of this sort have invariably been held valid by courts of last resort. *Way* v. *Reed*, 6 Allen, 364. *International Trust Co.* v. *Weeks*, 203 U. S. 364. The damages are fair, representing the actual loss to the lessor; they are not "accelerated rentals"; and they are in no way different from claims for the breach of any other executory contract.

It may not be a matter of great importance on what theory the claim of the petitioner is allowed. We believe that the rule in Massachusetts, set forth in *Deane* v. *Caldwell*, supra, and *Curtis* v. *Walpole Tire & Rubber Co.*, supra, and in New York, set forth in *Pennsylvania Steel Co.* v. *New York City Railway Co.*, supra, is the most reasonable and equitable; but we do not quarrel with the rule laid down by the Courts of the Third and Fifth Circuits, or the rule in the Seventh Circuit. Whether the true rule is that claims of this sort should be provable because liquidated and due before the time for filing claims has elapsed, or because bankruptcy or receivership constitute an anticipatory breach, is not so important as the fact that, on one theory or the other, claims of this sort, based on a fair and legally valid contract, are entitled in equity and fairness and justice to participate in the assets of the insolvent. Both respondents here are corporations, and both are insolvent; so if the claim of the petitioner is disallowed he will be left with a paper right against the respondent corporations after they have been divested of all assets and have become mere shells. This, it is submitted, would be the most hollow mockery of justice imaginable.

Let us also consider the matter from another aspect. Assume that the respondents were not corporations, but individuals. It is a well recognized general principle in all bankruptcy, insolvency or receivership proceedings and assignments for creditors, that where all the assets of a debtor are distributed to his creditors that debtor is discharged from such liabilities as participated in the distribution. The effect of the decisions of the Circuit Court of Appeals for the First Circuit in our case and in *Slocum* v. *Soliday*, supra, is to saddle unfortunate insolvents or bankrupts with a claim which may be of crushing magnitude, from which they cannot get a discharge. This result will be and should be prevented by the Court whenever possible. *Williams* v. *United States Fidelity and Guaranty Co.*, 236 U. S. 549.

We have hereinbefore cited only the most important decisions on the question involved. It is a fact, however, as appears from the following cases, that the great weight of authority is contrary to the position taken by the Circuit Court of Appeals for the First Circuit.

People v. *St. Nicholas Bank*, 151 N. Y. 592.
Woodland v. *Wise*, 112 Md. 35.
Kalkoff v. *Nelson, Rec.*, 60 Minn. 284.
Bolles v. *Crescent Drug & Chemical Co.*, 53 N. J. Eq. 614.
Minneapolis Baseball Co. v. *City Bank*, 74 Minn. Rep. 98.
McGraw v. *Union Trust Co.*, 135 Mich. 609.
Wilder et al. v. *McDonald*, 63 Ohio, 383.
Smith v. *Goodman, Assignee*, 149 Ill. 75.
In re Reading Iron Works, 150 Penn. 369.
Hoyle v. *Scudder*, 32 Mo. App. 372.

Conclusion.

The claims here presented can be divided into two parts, one for rent and other payments actually accrued at the time the claims were filed, and the other for damages on account of breach of the leases. We contend that the claims should be allowed in full, but if they are not allowed in full we contend that at least that portion representing rent accrued at the time the claims were filed should be allowed. Of course, though the petitioner has claims against both respondent corporations, he does not contend that he can collect more than the total amount of his claim under each lease; that is, that he can get more than one satisfaction.

We respectfully submit that the question involved is one of great importance, that the law on the subject is conflicting, and that the only method of finally determining the matter is for this Court to take jurisdiction by writ of certiorari.

ROBERT H. GARDINER, *Trustee of the Perry Real Estate Trust.*

By

BENTLEY W. WARREN,
ALEXANDER WHITESIDE,
HOWARD STOCKTON, Jr.,
His Counsel.

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Supreme Court of the United States.

October Term, 1915.

No. 395

ROBERT H. GARDINER, TRUSTEE OF THE PERRY REAL ESTATE TRUST,
PETITIONER,

v.

WILLIAM S. BUTLER & COMPANY, INC., AND EVERYBODY'S STORE, INC.,
RESPONDENTS.

Brief in Opposition to Petition for Writ of Certiorari.

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Supreme Court of the United States.

October Term, 1915.

No. 831.

ROBERT H. GARDINER, TRUSTEE OF THE PERRY REAL ESTATE TRUST,
PETITIONER,

v.

WILLIAM S. BUTLER & COMPANY, INC., AND EVERYBODY'S STORE, INC.,
RESPONDENTS.

Brief in Opposition to Petition for Writ of Certiorari.

The question is whether, in an equity receivership of an insolvent corporation, a lessor's claim for future rent, or for damages suffered through termination of the lease, or for liquidated damages or penalty stipulated in the lease, is entitled to rank with the claims of those who were creditors at the date of the decree appointing receivers and at the date of the decree ordering creditors to prove their claims.

The decree appointing receivers, upon a creditors' bill praying equitable distribution of the assets, was made November 7, 1912. The decree ordering creditors to prove their claims, made up as of November 7, 1912, was entered November 11, 1912.

There was no breach of the lease until December, 1912. On December 5 the receivers elected not to

assume the lease, and on December 9 the lessor entered and terminated the lease.

The lessor's claim had no existence at the date of insolvency. The question how to deal with claims which existed at that date, but could not be liquidated until a later time, yet within the time limited for proof of claims, is not involved.

A lease, as all the decisions recognize, differs from an executory contract. Suffering the appointment of receivers is a breach of such a contract, and, if the damages are ascertainable within a reasonable time limited for the proof of claims, they may be proved. The right to damages exists at the date of insolvency. Under a lease, on the other hand, no right to damages comes into existence until and unless the lessor enters and terminates the lease. Not only is the amount of the claim contingent, but the existence of the claim is contingent, upon action by the lessor after the insolvency.

Weeks v. *International Trust Co.*, 125 Fed. 370 (C.C.A. 1st), affirmed by —
International Trust Co. v. *Weeks*, 203 U.S. 364.

Whenever this question has arisen in the Circuit Courts of Appeals it has been decided in accord with the decision of the First Circuit in the present case.

Penn. Steel Co. v. *N.Y. City Ry. Co.*, 198 Fed. 721, 744 (C.C.A. 2d). Decision allowing claim for breach of executory contract distinguishes lease cases in dictum.
Crosstown Co's. Appeal, 198 Fed. 756, 760 (C.C.A. 2d).

The same question arising under the Bankrupt Act of 1898 has uniformly been decided against the lessor.

Slocum v. *Soliday*, 183 Fed. 410 (C.C.A. 1st).
In re Roth v. *Appel*, 181 Fed. 410 (C.C.A. 2d).
Colman Co. v. *Withoft*, 195 Fed. 250 (C.C.A. 9th).

Upon this point there is no conflict among the circuits.

In *Ludlow* v. *Pugh*, 213 Fed. 450 (C.C.A. 3d), affirming *Re Keith-Gara Company*, 203 Fed. 585, cited by the petitioner, an instalment of rent payable in advance became due and was unpaid *before the bankruptcy*. The lessor claimed the future rent for the rest of the term, which was less than a year, under the Pennsylvania statute giving a landlord priority for one year's rent. The Court held that, since the local statute was recognized by the Bankrupt Act, the claim was provable under section 63*a* (4).

Martin v. *Orgain*, 174 Fed. 772 (C.C.A. 5th), is a decision under a similar local statute. The rent was due in advance March 1. The adjudication in bankruptcy was March 9. The date of the petition does not appear, but the opinion contains nothing in conflict with the decisions in the First, Second, and Ninth Circuits.

In re Desnoyers Shoe Co., 227 Fed. 407, instead of conflicting with these decisions, cites them with approval.

Indeed, it is the spirit and purpose of the Bankrupt Act of 1898, although the language of section 63 is

ambiguous, that only such debts are provable as existed at the time of filing the petition.

Zavelo v. *Reeves*, 227 U.S. 625, 631.

Even under the Bankrupt Acts of 1841 and 1867, which expressly provided for proof of contingent and uncertain claims, a claim of this character, whose very existence was subject to a contingency, was not provable.

PUTNAM, J., in *Slocum* v. *Soliday*, 183 Fed. 410, 412.

GRAY, C.J., in *Deane* v. *Caldwell*, 127 Mass. 242, 244.

Logically, the same rule should apply in an equity receivership.

There is nothing to the contrary in —

Chemical National Bank v. *Hartford Deposit Co.*, 161 U.S. 1, affirming 156 Ill. 522, 528.

There the lessor's entry for breach was on May 1. The bank became insolvent on May 9. The receiver was appointed on July 21, and on July 27 he elected not to adopt the lease.

The state Court assumed that, if there had been no breach before insolvency, the lessor would have no provable claim. The question here presented was not considered either in the state Court or in the Supreme Court.

161 U.S. 1, at pages 9, 10.

The same rule is applied in common-law assignments for the benefit of creditors:

(*a*) Where the assignment provides for settlement under bankruptcy rules.

Cotting v. *Hooper-Lewis Co.*, 220 Mass. 273.

(*b*) Where the assignment provides for settlement under insolvency rules.

Shaw v. *United Shoe Machinery Co.*, 220 Mass. 486.

(*c*) Where the assignment leaves open the rules which shall be applicable.

Matter of Hevenor, 144 N.Y. 271.

The rule is essentially a rule of equity, whether applied in bankruptcy, insolvency, or receivership — seeking equal distribution as of the date when the insolvent corporation loses the right to manage its own affairs. It is inequitable to allow this claim, because it depends upon the action of the lessor after insolvency whether there shall be a claim or not, and, to some extent, the amount of it. The lessor made himself a creditor by his own act after the creditors had become entitled, both under the Bankrupt Act and upon equitable principles, to all the company's assets for pro-rata distribution.

In England since 1869, and in Massachusetts since 1879, the matter has been regulated by statute.

St. 32 and 33 Vict. c. 62, secs. 23, 37.
Deane v. *Caldwell*, 127 Mass. 242.
Abbott v. *Stearns*, 139 Mass. 168.
See *Bowditch* v. *Raymond*, 146 Mass. 109.

Except as the rule is qualified by statute, there is no conflict between the decisions of Massachusetts, of the

First Circuit, and of any other circuit. Therefore, although the question is one of importance and general interest, and has not been decided by this Court, we respectfully submit that the law is well settled by the decision and opinions of the Courts of the First Circuit.

CHARLES F. CHOATE, JR.,
FREDERICK H. NASH,
Of Counsel for the Respondents.

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ROBERT H. GARDINER,

Trustee of the Frank Real Estate Trust,

Appellant,

v.

WILLIAM S. BUTLER & COMPANY, Inc.,

EVERYBODY'S STORE, Inc.,

Appellees.

BRIEF FOR APPELLANT.

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Supreme Court of the United States

OCTOBER TERM, 1917, No. 95.

ROBERT H. GARDINER,
TRUSTEE OF THE PERRY REAL ESTATE TRUST,
Appellant,

v.

WILLIAM S. BUTLER & COMPANY, INC.,
EVERYBODY'S STORE, INC.,
Appellees.

BRIEF FOR APPELLANT.

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Massachusetts, Rev. Laws, Chap. 163, Sec. 33 29

Supreme Court of the United States

OCTOBER TERM, 1917, No. 95.

ROBERT H. GARDINER,
TRUSTEE OF THE PERRY REAL ESTATE TRUST,
Appellant,

v.

WILLIAM S. BUTLER & COMPANY, INC.,
EVERYBODY'S STORE, INC.,
Appellees.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This case comes before this Court upon a writ of certiorari granted March 2, 1916, to review a decision of the Circuit Court of Appeals for the First Circuit rendered December 9, 1915. The question presented is that of the provability, in equity receivership proceedings, of claims arising under leases of real estate upon default by the lessee and the assignee of the lease, upon breach of conditions of the leases and consequent termination thereof by the lessor, in accordance with the terms of the leases. The default, breach

of conditions, and terminations occurred after the appointment of the receivers, and the claims are for damages suffered by the lessor, part of the claims being under an express covenant for the payment of damages upon breach of conditions and termination.

FACTS.

The appellant, Robert H. Gardiner, is Trustee of the Perry Real Estate Trust, under a declaration of trust dated October 1, 1904, duly recorded in the Registry of Deeds for Suffolk County, Massachusetts, and is the owner as such Trustee of certain real estate in Boston, Massachusetts, which he leased to the appellee William S. Butler & Company, Inc., by lease dated December 19, 1910, and duly recorded in said Registry of Deeds (Record, p. 41), for a term of nine years and four months from January 1, 1911. Said lease is fully set forth in the Record, pp. 28–32, and contained the following provisions (omitting portions which are not germane):—

> "This lease is made on condition also that if the lessee shall neglect or fail to perform or observe any of the covenants herein contained . . . or . . . if a receiver . . . shall be appointed to take charge of any part of the property of or to wind up the affairs of the lessee . . . then the lessor lawfully may immediately or at any time thereafter, and without demand or notice, enter into and upon the demised premises or any part thereof in the name of the whole and repossess the same as of his former estate and expel the lessee and those claiming through or under him . . . without prejudice to any remedies for arrears of rent or preceding breach

of covenant, and upon entry as aforesaid the lessee's estate shall end. And the lessee covenants that in case of such termination . . . the lessee will, at the election of the lessor, which election may be made or changed at any time, either (*a*) pay to the lessor sums equal to the rent and other payments herein named at the same times and in the same installments or, if the premises shall have been re-let, sums equal to the difference between the aforesaid and the sums actually received by the lessor in proportionate installments as liquidated damages for so much of the unexpired term as is represented by such installments; or (*b*) pay to the lessor as damages a sum which at the time of such termination or at the time to which installments of liquidated damages shall have been paid, represents the difference between the rental value of the premises and the rent and other payments herein named for the residue of the term; or (*c*) indemnify the lessor against loss of rent and other payments herein named from the time of such termination or from the time to which installments of liquidated damages shall have been paid during the residue of the term."

This lease was assigned by William S. Butler & Company, Inc., to the appellee Everybody's Store, Inc., on September 30, 1912 (Record, p. 33).

On May 27, 1913, the appellant became the owner as such Trustee of certain other real estate in said Boston, and became entitled to the rights of the lessor under a lease of such other real estate dated April 10, 1911, duly recorded in said Registry of Deeds (Record, p. 42), from one Russell to said William S. Butler & Company, Inc., for a term ending March 31, 1921. This lease was also assigned by William S. Butler & Company, Inc., to Everybody's Store, Inc., on September 30, 1912. This lease contained the following provision (Record, p. 28):—

" . . . upon failure by the lessee to perform or observe the covenants herein by it to be performed or observed, or in case of the lessee's bankruptcy or in-

solvency, the lessor may thereupon enter the demised premises and repossess the same as of his former estate, without prejudice to such other remedies as he may have against the lessee."

On November 7, 1912, a bill of complaint (Record, p. 2) was filed against the appellee, William S. Butler & Company, Inc., in the District Court of the United States for the District of Massachusetts, and on that date, by consent of that company, receivers were appointed for said company by said Court (Record, p. 5). On the same date said receivership was extended to Everybody's Store, Inc., on its own petition and receivers were appointed for said company by said Court (Record, p. 8). Said receivers in each case were appointed to continue the business and conserve the assets of the companies, and there is nothing contained in the decrees appointing the various receivers conferring any power on them to wind up such companies, or indicating that winding up was contemplated.

The receivers of Everybody's Store, Inc., occupied the premises covered by both leases until December 30, 1912, paying rent agreed upon. Both sets of receivers elected not to affirm the two leases in December, 1912 (Record, pp. 42–43).

On November 11, 1912, said District Court entered an order that all creditors of William S. Butler & Company, Inc., present their claims, made up as of November 7, 1912, on or before January 1, 1913 (Record, pp. 9–10), and on September 11, 1913, said District Court entered an order requiring creditors of Everybody's Store, Inc., to present their claims, made up as of November 7, 1912, on or before October 1, 1913 (Record, p. 17).

The time for proving claims against both companies was extended by various orders of the Court to December 12, 1913 (Record, pp. 14, 15, 37, and 38).

All the assets of both companies have been sold and

converted into cash under orders of the Court, and in neither case is there sufficient to pay creditors in full, even though the claims of the appellant are not allowed (Record, p. 43).

The appellant entered upon the premises and terminated the lease dated December 19, 1910, on October 1, 1913, and the lease dated April 10, 1911, on June 16, 1913. The reason for this delay by the appellant in terminating these leases was that the receivers of Everybody's Store, Inc., on the ground that that company was solvent, were defending a bankruptcy petition filed against it on November 13, 1912. That petition was finally dismissed on that ground by the Circuit Court of Appeals for the First Circuit on September 10, 1913 (Record, pp. 56–57). The result was that the appellant had reason to believe he had an assignee of both leases which was solvent.

The appellant has filed two claims on said leases against each appellee.

These claims are made up as follows:—

Under the lease dated December 19, 1910, the appellant seeks to prove against each company for the rent reserved and other payments which the lessee was required to make from November 1, 1912, to October 1, 1913, the date of termination, less amounts received during that period. He also seeks to prove for the rents reserved, etc., from October 1, 1913, during the remainder of the term, less the estimated rental value of the premises for that period (Record, pp. 19–23).

Under the lease dated April 10, 1911, the appellant seeks to prove against both companies the amount of rent from the date of the acquisition of the property by the appellant to the end of the term, less the estimated rental value of the premises for that period (Record, pp. 23–26).

On December 15, 1913, said District Court referred certain disputed claims against both appellees to a special master, to hear the parties and their evidence, and report

to the Court thereon (Record, pp. 35–40). As appears in Exhibit C (Record, p. 36), and Exhibit C (Record, p. 39), and by stipulations (Record, pp. 37 and 40), the claims of the appellant were included in these orders of the Court.

Said special master reported in part as follows on these claims (Record, p. 44):—

> "It seemed to me proper, before hearing the parties upon the question of damages, to report to the Court the question whether under the circumstances of this case the claimant has any provable claim for any damages sustained by him."

The questions of law involved were heard by said District Court, and on October 31, 1914, Dodge, J., handed down an opinion (Record, pp. 45 through 48) in which he stated in substance that the appellant was not entitled under either lease to share in the distribution of the estate of either appellee, except to the extent of $213.89, being the rent due from November 1 through November 7, 1912, prior to the appointment of receivers. He disallowed the balance of the claims, and on December 12, 1914 (Record, p. 44), a decree was entered in accordance with the opinion.

This decision was appealed from (Record, p. 48).

Said appeal was heard by the United States Circuit Court of Appeals for the First Circuit, and on December 9, 1915, said Court handed down an opinion, refusing to allow the claims (Record, p. 55), and referring to its opinion in the case of *Wm. Filene's Sons Co.* v. *Weed*, 230 Fed. 31. (As this Filene case is also before your Honorable Court on a writ of certiorari, the opinion in that case is not made a part of the record in this.) A final decree was entered on December 9, 1915 (Record, p. 56).

SPECIFICATION OF ERRORS RELIED UPON.

The appellant Robert H. Gardiner, Trustee, relies upon the following assignment of errors:

1. That the court erred in disallowing the balance over two hundred thirteen dollars and eighty-nine cents ($213.89) of the claimant's claim against William S. Butler & Company, Incorporated, or any part thereof.

2. That the court erred in disallowing the balance over two hundred thirteen dollars and eighty-nine cents ($213.89) of the claimant's claim against Everybody's Store, Incorporated, or any part thereof.

3. That the court erred in not ruling that the claimant had a provable claim against the assets of said William S. Butler & Company, Incorporated, in the hands of the receivers in excess of two hundred thirteen dollars and eighty-nine cents ($213.89).

4. That the court erred in not ruling that the claimant had a provable claim against the assets of said Everybody's Store, Incorporated, in the hands of the receivers in excess of two hundred thirteen dollars and eighty-nine cents ($213.89).

5. That the court erred in not ruling that the claimant had a provable claim against the assets of William S. Butler & Company, Incorporated, in the hands of the receivers, under the lease from him to William S. Butler & Company, Incorporated, dated December 19, 1910, referred to in the report of the special master, in excess of two hundred thirteen dollars and eighty-nine cents ($213.89).

6. That the court erred in not ruling that the claimant had a provable claim against the assets of William S. Butler & Company, Incorporated, in the hands of the receivers, under the lease from Albert C. Russell to William S. Butler & Company, Incorporated, dated April 10, 1911, referred to in the report of the special master.

7. That the court erred in not ruling that the claimant had a provable claim against the assets of Everybody's Store, Incorporated, in the hands of the receivers, under the lease from him to William S. Butler & Company, Incorporated, dated December 19, 1910, referred to in the report of the special master, in excess of two hundred thirteen dollars and eighty-nine cents ($213.89).

8. That the court erred in not ruling that the claimant had a provable claim against the assets of Everybody's Store, Incorporated, in the hands of the receivers, under the lease from Albert C. Russell to William S. Butler & Company, Incorporated, dated April 10, 1911, referred to in the report of the special master.

9. That the court erred in not ruling that the claimant had a provable claim for damages against the assets of William S. Butler & Company, Incorporated, in the hands of the receivers, under the terms of the lease from the claimant to William S. Butler & Company, Incorporated, dated December 19, 1910, referred to in the report of the special master, in excess of two hundred thirteen dollars and eighty-nine cents ($213.89).

10. That the court erred in not ruling that the claimant had a provable claim for damages against the assets of William S. Butler & Company, Incorporated, in the hands of the receivers, under the terms of the lease from Albert C. Russell to William S. Butler & Company, Incorporated, dated April 10, 1911, referred to in the report of the special master.

11. That the court erred in not ruling that the claimant had a provable claim for damages against the assets of Everybody's Store, Incorporated, in the hands of the receivers, under the terms of the lease from the claimant to William S. Butler & Company, Incorporated, dated December 19, 1910, referred to in the report of the special master, in excess of two hundred thirteen dollars and eighty-nine cents ($213.89).

12. That the court erred in not ruling that the claimant had a provable claim for damages against the assets of Everybody's Store, Incorporated, in

the hands of the receivers, under the terms of the lease from Albert C. Russell to William S. Butler & Company, Incorporated, dated April 10, 1911, referred to in the report of the special master.

SUMMARY OF ARGUMENT.

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I. CLAIMS OF THE APPELLANT 12

(*a*) The amount or detail of the appellant's claims has never been judicially determined. The sole question before this Court is one of law, reserved by the District Court, namely, whether the appellant has provable claims 12

(*b*) The appellant's claims may be divided into two parts; one for rent and other payments due prior to the entries to terminate the leases, and the other for damages after termination on account of the breach of the leases 12

(*c*) Before the date finally set by the Court for filing proofs of claims it was possible by recognized methods of computation to determine exactly the amount of the appellant's claims, and this amount could have been proved before the Court or a master had the Court and master not decided to reserve the question of law instead of hearing evidence on the damages . . . 13

(*d*) The claims are against two companies in the hands of the same set of receivers; against one company as lessee and against the other as assignee of the lease. The claims if provable at all are provable against both, although the appellant does not contend that he can get more than one satisfaction 14

II. THE QUESTION OF LAW 14

In an equity receivership of an insolvent corporation where the assets are distributed by the

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Court to creditors, is a creditor entitled to participate in the assets for claims based on rents reserved and damages for breach of leases falling due and occurring after the appointment of receivers but within the time for filing proofs of claims; *provided* the accrued rents and damages are fixed or readily determinable?

III. The Opinion of the Circuit Court of Appeals . 15

The Circuit Court of Appeals in this case handed down a *per curiam* opinion stating that the case was concluded by *William Filene's Sons Company* v. *Weed*, a case decided simultaneously with this and now before this Court on certiorari, Docket No. 93, October Term 1917.
In the argument the opinion of the Circuit Court of Appeals in the Filene case is dealt with at length, and each of the principal points made by the Court is treated separately.

IV. The Claims are Provable Under the Established Practice of Courts of Equity 18

It is settled in Massachusetts that claims like those of the appellant are "debts" and that covenants of the sort contained in these leases are enforceable. The appellees contend, however, that these claims were not "debts" at the time the receivers were appointed, and that even though they became so subsequently are not entitled to participate in the receivership assets.
The appellant contends:

(*a*) That under the practice in this Court the claims should be allowed 19
(*b*) That under the practice in New York State and the Second Circuit the claims should be allowed 20
(*c*) That under the practice in Massachusetts the claims should be allowed 27
(*d*) That under general equity practice the great weight of authority in this country

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and in England is contrary to the decision of the Circuit Court of Appeals for the First Circuit 30

(*e*) That under the Bankruptcy practice there is a sharp conflict between the various jurisdictions as to whether claims similar to the appellant's are provable in bankruptcy. The appellant contends, however, that the bankruptcy rule arises under a statute, and need have no application to an equity case.

V. The Equity of the Situation 34

(*a*) Claims based on other executory contracts are allowed in receivership proceedings, and there is no reason for a distinction between a lease and any other executory contract 34

(*b*) If a lease is broken by default of the lessee and the lessor suffers damages on account of that breach, and those damages can be determined, he should be allowed to prove his claims 35

(*c*) The leases in this case were recorded in the Registry of Deeds for the proper county more than a year before the appointment of receivers for the two respondent companies, and this not only constituted notice to all the world but actually permitted anyone desiring to advance credit to either company to ascertain its obligations under the leases 35

(*d*) The claims are not for accelerated or future rentals, but claims for damages actually suffered by the appellant 36

VI. Conclusion 37

Both appellees are corporations, both are insolvent, so if the appellant is not allowed to prove his claims against the assets in the hands of the receivers he is left with an undoubted legal claim against both appellees which he cannot possibly collect.

ARGUMENT.

The Claims of the Appellant.

It is *not* necessary to consider either the amount or the detail of the appellant's claims. The sole question before the Court is one of law. The master appointed by the District Court, with the approval of the Court and without determining the damages, reserved the question whether the appellant had provable claims.

It *is* necessary to consider the nature of the appellant's claims. These may be divided into two parts,—one for rent and other payments due under the leases before the entries to terminate, and the other as damages on account of the breach of the leases.

The entry to terminate the lease dated April 10, 1911 (the Russell lease), took place on June 16, 1913 (Record, p. 43); and that to terminate the lease dated December 19, 1910 (the Gardiner lease), on October 1, 1913 (Record, pp. 42 and 46), both of which dates were prior to the date finally set by the District Court for the allowance of claims.

After termination, the appellant's rights to prove damages under the Russell lease must depend entirely upon the lessee's covenants to pay rent, etc., during the full term of the lease, and the amount of the appellant's claim would be the damages sustained on account of such breach. No special covenants appear in the Russell lease (Record, pp. 27–28) such as appear in the Gardiner lease (Record, pp. 28–32) as to the rights of the lessor and the liabilities of the lessee upon termination for breach of covenant. The lessee, however, under the Russell lease covenanted to pay rent "during the full term of this lease."

After termination, the appellant's rights under the Gardiner lease would seem to depend not only on the lessee's covenant to pay rent, etc., but also on the special covenants (Record, p. 31) relating to termination of the lease. These, briefly summarized, are that in case of termination the lessee will, at the election of the lessor (which election may be made or changed at any time) either—

(*a*) Pay to the lessor sums equal to the rent, etc., named, or, in case the premises have been re-let, sums equal to the difference between the rent, etc., and the sum actually received by the lessor;
(*b*) Pay to the lessor *as damages* a sum which at the time of termination represents the difference between the rental value of the premises and the rent, etc., for the residue of the term;
(*c*) Indemnify the lessor against loss of rent, etc., from the time of termination during the residue of the term.

As the term of the Russell lease did not expire until April 9, 1921, and the term of the Gardiner lease did not expire until April 30, 1921, it is obvious that it was not possible on June 16, 1913, and October 1, 1913, the dates of the respective terminations of the leases, to state then exactly the damages sustained under the Russell lease, or the loss of rents sustained under the Gardiner lease.

Furthermore, at the time the proofs of claims were filed neither of the leased premises had been re-let, so that it was then not possible to state the difference between the rents of the two leases and the sums actually received by the lessor.

It was, however, possible under the Russell lease to estimate before the time finally limited by the Court for filing claims the probable damages sustained on account of its breach, and, under clause (*b*) of the provisions in relation to termination (Record, p. 31) of the Gardiner lease, the

damages as measured by the difference between the rental value of the premises and the rents reserved could have been as readily determined by trained real estate experts as the market value of merchandise or securities; therefore, certainly under that lease the appellant's damages were determinable before the date finally set by the Court for filing proofs of claims, had the master and the Court been willing to take evidence on the point, instead of reserving the question of law; and the situation is no worse now.

As the assets of the two companies have not yet been distributed, and as the premises have been actually re-let (although, of course, that does not appear by the record) it is possible now to show the actual loss sustained under both leases.

The lessee and assignee of a lease are equally liable to the lessor for rent and payments thereunder (*Wall* v. *Hinds*, 4 Gray, 256, 266) and, therefore, the appellant has filed claims against both appellees. He does not, however, contend that he can collect more than the total amount of his claim under each lease; that is, that he can get more than one satisfaction.

The Question of Law.

The sole question involved is whether, in a receivership in equity of an insolvent corporation in the District Court, where the Court orders the assets distributed to creditors, a creditor having a claim for rent reserved and a claim for damages for breach of a lease is entitled to participate in the assets, where the rent reserved became due and the breach

occurred, and the accrued rent and damages were fixed or readily determinable, after the appointment of the receivers (unless the appointment constituted an anticipatory breach) but before the expiration of the time prescribed by the Court for filing proofs of claims.

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THE OPINION OF THE CIRCUIT COURT OF APPEALS.

The majority opinion of the Circuit Court of Appeals for the First Circuit disallowing the claims of your petitioner is a *per curiam* opinion (Record, pp. 55–56) and states that the case is concluded by *Wm. Filene's Sons Co.* v. *Weed*, a case on very similar facts decided practically simultaneously with this, which is also now before this Court on a writ of certiorari (Docket No. 93, October Term, 1917). The opinion of the majority of the Court, by Brown, J., in *Wm. Filene's Sons Co.* v. *Weed*, must therefore be considered as applying to our case.

Briefly summarized, this opinion rests on the following grounds:—

1. Judge Brown says that the fact that the lease was recorded does not assist the appellant, but on the contrary injures him, because thereby other creditors were informed that the appellant had no claim. In other words, according to the learned Judge, other creditors would naturally anticipate the decision of the Circuit Court of Appeals that the appellant had no claim, and therefore it would be inequitable to allow any claim.

It is respectfully submitted that other creditors of the lessees, or other people desiring to extend them credit, had, on account of the fact that the leases were recorded in the Registry of Deeds for the proper County, at least constructive notice of them, and either had or could readily have obtained, if they had cared to investigate, actual notice of the fact that claims, such as are presented here, might arise, and, further, that they could not naturally anticipate the decision of the Circuit Court of Appeals that the appellant had no claim. Therefore, they were either fully warned, or might have been so, had they taken the precaution to investigate before extending their credits, that these leases might share with them in any distribution of assets.

2. Judge Brown says that the appellant did not enter into the covenant for damages in case of the appointment of a receiver, upon the faith of the lessee's assets, and therefore should not be entitled to participate in such assets.

It is submitted that there is absolutely no evidence that this is so, and it cannot be implied from the covenant itself. If the appellant did not enter into this covenant on the faith of the lessee's assets, why did he enter into it? The lessees are corporations, and if divested of their assets are, of course, not financially responsible.

3. Judge Brown argues that other creditors were entitled to disregard the mere possibility of a future debt coming into being after the filing of the creditors' bill.

It is submitted that the covenants were in existence before the filing of the bill, and as the leases were recorded, the other creditors had notice of them,—notice of executory contracts which might ripen into claims, based as much upon the assumption of solvency as contracts of merchandise creditors.

4. Judge Brown says that creditors had asserted their right to the assets before any breach occurred by the act of the lessee, and thus the claim arises too late.

This statement, it is submitted, is hardly an apt one, as both receiverships were by consent of the appellees (Record, pp. 4, 6, 7). Thus, so far as the proceedings contemplated liquidation at all, they should be classed in the same category as voluntary proceedings by a corporation for liquidation. However, it should be noted that the decrees appointing the receivers did not contemplate liquidation (Record, pp. 5, 6, 8, 9), and that, in the case of Everybody's Store, the receivers themselves contended that the corporation was solvent (Record, p. 56). A receivership, unlike bankruptcy, does not change the title to the property of the corporation, and there is no inherent right in creditors to the distribution of assets among themselves. High on Receivers, 4th Ed., §§ 5, 357, 841. Thus, in a receivership of this kind, there cannot be said to be any sequestration of assets for the benefit of creditors as of the date of the appointment of the receivers.

5. Judge Brown states that the rule is the same in equity as in bankruptcy.

In this last statement he is in accord with Judge Putnam, who wrote the minority opinion, stating that he felt bound by the decision of the Circuit Court of Appeals for the First Circuit in *Slocum* v. *Soliday*, 183 Fed. 410 (where a claim like that of the petitioners was disallowed in *bankruptcy*), though he admitted that he did not know whether the case was governed by this rule or not (Record, pp. 55–56).

The appellant contends that the provability of his claim is to be determined by rules of equity, and not in any way by the Bankruptcy Act. If, however, it be held that the Bankruptcy Act is applicable, the appellant contends that under the better practice in bankruptcy his claims are

provable and that the decisions of the Circuit Court of Appeals for the First Circuit in this case and in *Slocum* v. *Soliday*, supra, are erroneous.

Ludlow v. *Pugh*, 213 Fed. 450;
Re Keith-Gara Co., 203 Fed. 585;
In re Caloris Mfg. Co., 179 Fed. 722;
Martin v. *Orgain*, 174 Fed. 772;
In re Desnoyers Shoe Co., 227 Fed. 401;
N. Y. Security and Trust Co. v. *Lombard Investment Co.*, 73 Fed. 537, 546, 547;
Ex parte Lynvi Coal and Iron Co., in re Hide, L. R. 7 Ch. App. 28;
Williams v. *U. S. Fidelity & Guaranty Co.*, 236 U. S. 549;
Central Trust Co. v. *Chicago Auditorium*, 240 U. S. 581.

The Claims are Provable under the Established Practice of Courts of Equity.

It is well settled in Massachusetts that claims like those of the appellant are "debts" and that the covenants are enforceable against the lessee. *Woodbury* v. *Sparrell Print*, 187 Mass. 426; *Edmunds* v. *Rust & Richardson Drug Co.*, 191 Mass. 123. The only contentions of the appellees, therefore, are that these claims were not "debts" at the time the receivers were appointed, and for that reason are not entitled to participation in the receivership assets. In support of these contentions they cited, in the Circuit Court of Appeals, numerous cases, practically all of which, however, are governed by the Bankruptcy Act or some other

statute laying down definite rules as to what claims are provable, or, in the case of assignments for the benefit of creditors, by restrictions in the particular assignment as to what claims are provable. These cases are all distinguishable from the case at bar, where there are no restrictive statutes and where nothing stands in the way of justice except the necessity that receiverships be not unduly prolonged.

There are, on the other hand, a number of equity cases where the question has arisen, and where there were no restrictive statutes to hamper justice.

(a) *The Practice in this Court.*

The rule to be followed in cases like the case at bar has never been expressly laid down by this Court, but in several cases the question has arisen in one form or another.

In *International Trust Co.* v. *Weeks*, 203 U. S. 364, the validity of a claim in many respects similar to that of the appellant was questioned in proceedings for winding up an insolvent national bank. Under the terms of a lease to the bank the lessor had the right to re-enter for breach of covenant, and to re-let the premises at the risk of the lessee, who was to remain responsible for the rent reserved for the residue of the term, less such amounts as the lessor actually realized. The bank became insolvent and a receiver was appointed, *and after the appointment of the receiver* the lessor entered for breach of condition. (See *Weeks* v. *International Trust Co.*, 125 Fed. 370, at 372, C. C. A. 1st Circuit, 1903.) The Court held the claim invalid, because the lessor had unreasonably refused to re-let the premises. In other respects, however, both this Court, and Judge Lowell in the Circuit Court of Appeals, appear to consider the claim valid, and make no point of the fact that there was no entry for breach of condition until after the appointment of the receiver.

In *Chemical National Bank* v. *Hartford Deposit Company*, 161 U. S. 1, the following state of facts arose: a national bank took a lease of banking rooms, dated November 18, 1892, for a period of five years from May 1, 1893, at an annual rental of $12,000, payable in equal monthly instalments of $1,000, in advance. The first instalment of rent was due May 1, 1893, and this rent was not paid. On May 9, 1893, the bank became insolvent, and a national bank examiner took possession of its assets and of said premises. On July 21st a receiver was appointed, and on July 27th he notified the lessor of his election to terminate said lease after July 31, 1893. He paid all the rent up to July 31st, but no further rent was paid, and the premises remained vacant until May 1, 1894, when they were re-let at a lower figure. The lessor brought an action of assumpsit in the Illinois State Court against the bank to recover damages for failure to pay rent, and judgment rendered in the sum of $9,000 by the Illinois Court was affirmed by the Supreme Court. One of the questions considered by this Court was whether the claim was an existing demand at the time of the suspension of the bank, and whether it was entitled to participate in the distribution of the assets. This Court holds that part of the claim, namely, the rent due on May 1, 1893, was an existing demand, and evidently considers that it made no difference that this part had been paid and that the rest of the claim was not an existing demand. In other words, this Court holds that the entire claim was proper, even though the unpaid balance was neither due nor existing at the time of the appointment of the receiver.

Under these decisions, we submit, the claims of the appellant should be allowed.

(b) *The Practice in New York and the Second Circuit.*

In *Pennsylvania Steel Company et al.* v. *New York City Railway et al.*, 198 Fed. 721 (C. C. A. 2d Circuit, 1912), in

the portion thereof known as the "Express Company's Appeal," at page 735, the facts briefly summarized were as follows: The Metropolitan Railway Company had a written contract with an express company, by which it granted to the latter the exclusive rights of moving express matter over its street railway system for a period of twenty years. This contract was later assigned by the Metropolitan Railway Company to the City Railway Company. On September 24, 1907, receivers were appointed for the City Railway Company. The receivers continued to fulfil the contract until February 28, 1908, on which date they notified the express company that they would not adopt the contract. The express company filed a proof of claim against the estate of the Railway Company for damages for breach of this contract, and the Circuit Court of Appeals for the Second Circuit held that the claims should be allowed for such damages as might be established upon hearing. In the course of this opinion the Court uses the following language:—

> *Page 738.* "Equitable considerations must govern and the underlying ones are these: The assets of an insolvent corporation belong to its creditors. Although not, strictly speaking, a trust fund, they partake of the nature of one. The administration of the estate is for their benefit. Its purpose is to make an equitable distribution. Equality is equity. Debts and liabilities, present and future, certain and contingent, stand upon the same *equitable* basis. If delays were unimportant, the settlement of estates would be kept open until contingencies should become certainties. If courts were omniscient, distribution would always be through the resolving of all contingencies and the ascertainment of the present worth of all demands. But courts cannot look with certainty into the future. Delays are important. The settlement of estates cannot be held open to await contingencies. Orderly administration requires that at some reasonably speedy time all claims should be so liquidated as to afford a basis for distribution."

Pages 739 and 740. "The real inquiry in getting at a basis for the distribution of an insolvent estate is whether the claims are reduced to dollars and cents. If they are so reduced or can be so reduced by the application of recognized principles they are entitled to share. If they are not they cannot share. And this not at all for any reason affecting their merits nor strictly speaking because they are contingent, but because they are uncertain. So, without laying stress upon the question whether claims are (1) past due, (2) immature, or (3) contingent, the real way we should divide them with respect to the question of provability is into these two classes:

"(1) Claims of which the worth or amount can be determined by recognized methods of computation at a time consistent with the expeditious settlement of the estates;

"(2) Claims which are so uncertain that their worth cannot be so ascertained.

"The second class of claims cannot be proved. They may be highly meritorious, but they cannot share in the estate because their amounts cannot be ascertained.

"The first class of claims ought to be proved and share in the estate and this whether they are overdue accounts, immature notes, or *claims for damages for breach of contract coinciding with or following the receivership.* It is impossible to point to any equitable ground which would justify a court of equity in excluding the holders of any of such claims from sharing in the estate of their debtor." (Our italics.)

Pages 741 and 742. "Under the foregoing decision creditors were permitted to prove claims which, although not matured and certain at the time of the appointment of the receivers, became such before any order of distribution. We think this rule very nearly correct, although it probably goes too far in permitting the proof of claims up to the time of distribution. All claims ought to be in before the accounts are made up for distribution, and there should be no opportunity for uncertainty, delay or expense in reopening and recasting them. A narrower rule can be adopted which would obviate any difficulty in this regard and which

would be simple, equitable and workable. It is this: Claims which when presented within the time limited by the court for their presentation are certain or are capable of being made certain by recognized methods of computation, should be allowed. Claims which are not then certain should be disallowed because they afford no basis for making dividends. But there is no equitable reason why claims which are certain when presented and which are presented in time should have been certain at some arbitrary anterior period."

Page 745. "Manifestly the claimant was entitled to recover the value of its contract. Manifestly also the value of its contract was what it would have made by its performance. Gains prevented, when fairly shown, are recoverable as damages for breach of contract. But future gains must be measured by past performance. Consequently profits under a contract for a reasonable period before its breach may be shown to establish gains prevented by its breach. These principles are clearly stated and the necessity for latitude in the reception of proof of damage are pointed out in the opinion of the New York Court of Appeals in *Wakeman* v. *Wheeler & Wilson Mfg. Co.*, 101 N. Y. 205, 209, 4 N. E. 264, 266 (54 Am. Rep. 676)."

The respondents possibly will contend that the note at the bottom of page 744 of 198 Fed. in *Pennsylvania Steel Company et al.* v. *New York City Railway et al.*, supra, distinguishes the case before it from cases of leases. This note is as follows:—

"It should be observed that there is no analogy between a case like the present one and the bankruptcy cases relating to leases of real estate like *In re Roth & Appel*, 181 Fed. 667, 104 C. C. A. 649, 31 L. R. A. (N. S.) 270. In those cases it is held that the estate in lands which passes to a lessee is not divested by his bankruptcy when the trustee does not elect to assume the lease. Under such conditions the bankrupt lessee retains the lease upon the same footing as before. In other words the situation of the leasehold

> interest is as if nothing had happened. The present case is more like that of the bankruptcy of a lessor whose trustee drives the tenant out of possession and then insists that the lease has not been broken."

It is submitted, however, that the intention of the Court was not to distinguish between leases and other executory contracts, but between the rule in *bankruptcy* as laid down by the courts in the Second Circuit, and the rule in *equity*. Under the bankruptcy decisions in the First and Second Circuits (*Slocum* v. *Soliday*, 183 Fed. 410 C. C. A. 1st Circuit; *In re Roth & Appel*, 181 Fed. 667 C. C. A. 2d Circuit), in order to render a claim on an executory contract provable in bankruptcy, it is necessary to hold that bankruptcy constitutes an anticipatory breach, and that therefore the debt was due when the proceedings were commenced. In the express company case above cited, however, there is no suggestion of any anticipatory breach, and there was in fact no breach of the contract whatsoever until the receivers of the railway, several months after their appointment, refused to continue the contract. Under the *bankruptcy* rule followed in the First and Second Circuits, therefore, the claim of the express company would not have been allowed.

Finally, in answer to any contention that this footnote makes a judicial distinction between the leases and other executory contracts, it is submitted that, if this be so, it is an incorrect distinction. A lease is a bargain, most of the terms of which are of necessity executory. It is as solemnly entered into by the parties as any other written executory contract, and when the terms covering all possible contingencies are as clearly set forth as they are in the Gardiner lease, it is obvious that the parties have considered those terms, and were satisfied with them, at least when the bargain was made.

The respondents will possibly further contend that the portion of *Pennsylvania Steel Company et al.* v. *New York*

City Railway et al., supra, applicable hereto is not the "Express Company's Appeal," but the "Crosstown Company's Appeal," at page 756. That, however, was a case of breach of a 999-year lease, and the Court held that damages were too conjectural because of the impossibility of determining the rental value for the remainder of the term. In our case we do not have this difficulty.

It further appears that the Circuit Court of Appeals for the Second Circuit distinguishes in claims of this kind between equity proceedings and bankruptcy proceedings from the case of *In re Mullings Clothing Co.*, 238 Fed. 58 (C. C. A. 2d Circuit, 1916).

Here one Mullings, the claimant, leased a building to the Mullings Clothing Company by lease dated July 25, 1913, for the term of five years from October 1, 1914, at the annual rental of $12,000 per year, payable in monthly instalments of $1,000 per month. On August 21, 1914, the Mullings Clothing Company petitioned the State Court in Connecticut for a receiver for the purpose of effecting a winding-up of the company, and thereupon a receiver was appointed, who, acting under the instructions of the Court, repudiated the lease, but continued in possession until the end of October, 1914, paying $800 rent for that month, which was accepted by the landlord as full payment. The receiver then left the premises and surrendered the keys to the landlord, who entered and took possession and later found a new tenant who was to pay $9,000 per year for a five-year lease from March 1, 1915. On December 30, 1914 (after the landlord had taken possession), the Mullings Clothing Company filed a voluntary petition in bankruptcy and on the same day was adjudicated a bankrupt. The landlord presented a claim in the bankruptcy proceedings for $15,000 damages.

The Court holds:—

(1) That the dissolution of the corporation did not of itself terminate the lease;

(2) That by taking steps to dissolve the company, the lessee renounced the lease and disabled itself from performing it, which amounted to an anticipatory breach, and gave rise to an immediate claim for damages by the landlord, which could have been enforced against the assets in the hands of the receiver;

(3) That as the obligation incurred by the repudiation of the lease was in existence at the time of the bankruptcy, the claim is provable in bankruptcy.

The importance of this case in connection with the case at bar rests, we submit, not so much on the fact that the claim was allowed in the bankruptcy proceedings, as on the fact that it would have been allowed in the receivership proceedings had no bankruptcy supervened, in spite of the fact that no entry was made by the landlord until after the appointment of the receiver. If, instead of liquidation proceedings, the bankruptcy petition had been filed on August 21, 1914, under the rule laid down in the Second Circuit *In re Roth & Appel*, 181 Fed. 667 (C. C. A. 2d Circuit, 1910), this claim would not have been provable, while in equity it would be provable. The case clearly shows that the courts in the Second Circuit, at any rate, recognize that courts of equity, in the administration of receiverships, are not bound by the Bankruptcy Act, and will apply a different rule in determining what claims are provable. Also, it shows that by the note to the decision of *Pennsylvania Steel Company et al.* v. *New York City Railway*, supra, the Court did not intend to distinguish between claims under leases and those under other executory contracts, but between claims in equity proceedings and claims in bankruptcy.

In *People* v. *St. Nicholas Bank*, 151 N. Y. 592, a lessee corporation became insolvent and proceedings were instituted for its dissolution and a receiver was appointed. The receiver vacated the leased premises and the lessor leased to a third party at a lower rental and presented a

claim to the receivers for damages, which the Court held should be allowed.

See, also, *People* v. *National Trust Co* 82 N. Y. 283;
Matter of Whitney, 144 N. . App. Div. 117
(affirmed 202 N. Y. 580 without opinion).

These cases, we submit, clearly show that, under the practice in New York and the Second Circuit, claims such as those of the appellant are allowed in equity proceedings.

(c) *The Practice in Massachusetts.*

We, of course, do not contend that the Federal courts in Massachusetts are in any way bound by Massachusetts statutes or cases as to procedure. We do contend, however, that the State rule is entitled to some weight, and that in order to secure uniformity it should be followed so far as consistent with equitable principles and rules of procedure in the Federal courts.

Most of the cases in Massachusetts on the subject are cases in insolvency or under assignments for the benefit of creditors, and most of them are governed either by the strict Massachusetts insolvency statute, which provided that only debts due may be proved, or by the Bankruptcy Act because of restrictions in the particular assignment for the benefit of creditors as to what claims shall be provable. Such cases are *Cotting* v. *Hooper, Lewis & Co., Inc.*, 220 Mass. 273, where an assignment provided for distribution as if under the Bankruptcy Act, and *Shaw* v. *United Shoe Machinery Co.*, 220 Mass. 486, where an assignment provided for distribution in accordance with the Massachusetts insolvency statute. These cases are therefore distinguishable from ours.

The case of *Deane* v. *Caldwell*, 127 Mass. 242, however, is a case of a claim for rent against *the insolvent estate of a deceased person*, and this sort of a case is not governed by

the Massachusetts insolvency statute applicable to living insolvents, and claims provable are not limited by statute to "debts due," but any "creditor" may present claims. In this case there was a five-year lease expiring in 1879. In February, 1876, the estate of the deceased lessee was represented insolvent in the Probate Court. In April, 1876, the lessor presented a claim for damages estimated at the difference between the rent reserved and the rental value for the rest of the term, and, if that should be disallowed, a claim for rent accrued up to the time of the presentation of the claim. In August, 1876, the administrators surrendered the lease, and this surrender was accepted by the lessor. Gray, C. J., holds that the plaintiff was entitled to prove for rents accrued up to the time of the actual presentation of proof of claim to the commissioner in insolvency, and that there is a distinction between claims of this nature against a living bankrupt or insolvent and those against a deceased person's estate. In the case of claims against a deceased person there being no debtor surviving, if claims of this nature were not provable they would be lost. So in *Deane* v. *Caldwell*, supra, the lessor is allowed to prove for rent accrued up to the time of the presentation of the claim, but is not allowed to prove for future rent, because, according to the Court, there had been no breach of the covenant in the lease which would sustain an action either for rent or for damages. The surrender of the lease by the administrators and its acceptance by the lessor having been absolute, without reservation of any right to recover loss occasioned by being compelled to rent the premises at a reduced rental, it is held that the lease and all liability on the covenants thereof had terminated. Clearly, if at the time of the surrender of the lease a right had been reserved by the lessor to recover damages for breach of the lease, as is the case in the case at bar (Record, pp. 12, 13, 14), a claim for such damages would have been held by the Court to be provable. That this is the law in Massachusetts is further

shown by a dictum in *Cotting* v. *Hooper Lewis & Co., Inc.*, supra. The Court says (220 Mass. 275):—

> "If the assignment contained no provisions as to the nature and character of the liabilities of the assignor, upon which dividends were payable, the question whether plaintiffs can participate would have to be determined as at common law. *Andrews* v. *Tuttle-Smith Co.*, 191 Mass. 461; *Smith* v. *Goodman*, 149 Ill. 75."

Andrews v. *Tuttle-Smith Co.*, 191 Mass. 461, has little to do with the question, but *Smith* v. *Goodman*, 149 Ill. 75, is a case exactly like ours, where a claim for rent similar to ours was allowed. The rule set forth in that case, therefore, would seem to represent the view of the Supreme Judicial Court of Massachusetts as lately as March 3, 1915, of what the common law is.

The policy in Massachusetts is further shown by the Massachusetts Insolvency Statute on the subject, which is as follows, omitting immaterial portions,—

Revised Laws of Massachusetts, Chap. 163, § 33:—

> "If any of the property of a debtor consists of a lease . . . the assignee at any time may . . . elect to accept and hold under said lease . . . or to disclaim it. If he elects to disclaim, such lease . . . shall thereupon be considered to have been surrendered as of the day on which said disclaimer was so filed. If the debtor obtains his discharge in insolvency, he shall be discharged from all liability under or by reason of said lease . . . , whether the assignee does or does not disclaim the same as aforesaid; and the lessor or those having his estate in the premises may prove such damages if any, as are caused by such surrender, as a debt against the estate of the debtor; . . ."

This statute was commented on in *Abbott* v. *Stearns*, 139 Mass. 168, and *Bowditch* v. *Raymond*, 146 Mass. 109, but the question involved in the case at bar was not passed on

in either case. It should be noted that in the case at bar there was an express disclaimer of both leases by the receivers, before the re-entry by the lessor.

(d) *The General Equity Practice.*

The great weight of authority in other States and in England is contrary to the position taken by the Circuit Court of Appeals for the First Circuit, as the following cases show:—

Woodland v. *Wise*, 112 Md. 35;
Kalkoff v. *Nelson, Rec.*, 60 Minn. 284;
Bolles v. *Crescent Drug & Chemical Co.*, 53 N. J. Eq. 614;
Minneapolis Baseball Co. v. *City Bank*, 74 Minn. Rep. 98;
McGraw v. *Union Trust Co.*, 135 Mich. 609;
Wilder et al. v. *McDonald*, 63 Ohio, 383;
Smith v. *Goodman, Assignee*, 149 Ill. 75;
In re Reading Iron Works, 150 Penn. St. 369;
Hoyle v. *Scudder*, 32 Mo. App. 372;
Chicago Fire Place Co. v. *Tait*, 58 Ill. App. 293;
Reynolds v. *Fuller*, 64 Ill. App. 134;
In re Panther Lead Co. [1896] 1 Ch. 978;
In re Midland Coal Co. [1895] 1 Ch. 267;
Hardy v. *Fothergill*, 13 A. C. 351.

(e) *The Bankruptcy Practice.*

There is a sharp conflict among the bankruptcy cases as to whether claims similar to those of the appellant are provable in bankruptcy.

On the one side, holding that such claims are provable, we find cases like *Ludlow* v. *Pugh*, 213 Fed. 450 (C. C. A. 3d Circ.) affirming and adopting the opinion in *Re Keith-Gara Co.*, 203 Fed. 585 (D. C. E. D. Penn. 1913); *In re Caloris*

Mfg. Co., 179 Fed. 722 (D. C. E. D. Penn. 1910), a case almost exactly similar to the case at bar except that it involves the validity of a claim *in bankruptcy; Martin* v. *Orgain*, 174 Fed. 772 (C. C. A. 5th Circ. 1909); *In re Desnoyers Shoe Co.*, 227 Fed. 401 (C. C. A. 7th Circ.); *New York Security & Trust Co.* v. *Lombard Investment Co.*, 73 Fed. 537, 546, 547 (C. C. W. D. Mo. 1896); and, under the English Bankruptcy Act, *Ex parte Lynvi Coal & Iron Co., in re Hide*, L. R. 7 Ch. App. 28.

On the other side, holding that such claims are not provable in bankruptcy, typical cases are *In re Roth & Appel*, 181 Fed. 667 (C. C. A. 2d Circ.); *Slocum* v. *Soliday*, 183 Fed. 410 (C. C. A. 1st Circ.); and *Cotting* v. *Hooper, Lewis & Co., Inc.*, 220 Mass. 273. We merely mention these cases without further comment because we contend that the bankruptcy rule, whatever it may be, has no application in an equity case like the case at bar. If, however, it be held that the bankruptcy rule is applicable, we submit that the authorities allowing claims like those of the appellant are better reasoned and much more equitable and within the spirit of the Act than those barring such claims. This, we think, is clearly shown by two recent bankruptcy cases decided by this Court, neither of which deals with the precise question involved in the case at bar, but both of which show clearly that, even in bankruptcy, claims of the general nature of the claims of the appellant will be admitted to proof.

In *Williams* v. *United States Fidelity and Guaranty Co.*, 236 U. S. 549, builders entered into a contract to build and gave a bond guaranteeing performance, with the Fidelity Company as surety. They abandoned the contract, the owners completed the structure, and on May 14, 1901, made demand for the amount expended beyond the contract price. On May 28, 1901, the builders became bankrupt, and in October, 1901, received their discharges. Suit was brought against the Fidelity Company by the

owners and judgment was recovered July 1, 1904, and was satisfied. The Fidelity Company then brought this suit against the builders for the amount paid out by it. *Held:* That the claim of the Fidelity Company was provable in the bankruptcy proceedings and was therefore barred by the discharge. The Court says, at pages 554–555:—

> "It is the purpose of the Bankrupt Act to convert the assets of the bankrupt into cash for distribution among creditors and then to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes."

In *Central Trust Co.* v. *Chicago Auditorium*, 240 U. S. 581, the effect of bankruptcy as an anticipatory breach of an executory contract was passed on. By the contract in question a hotel company granted to a transfer company the privilege of transporting patrons of the hotel and their baggage, the transfer company agreeing to pay $350 per month therefor, for five years. The transfer company became bankrupt on an involuntary petition, the trustee in bankruptcy did not elect to assume the contract, and the hotel company made a new contract with a third party at a lower rent and sought to prove its claim for unliquidated damages for breach of the contract. Under the terms of the contract the hotel company had the right, in the event of default by the transfer company continued for thirty days, to terminate the contract at its option, whereupon the transfer company was to remain liable for the entire amount agreed to be paid, and the hotel company had the right also to terminate the contract on six months' notice whenever in its opinion the service of the transfer company was unsatisfactory.

The Court holds that the claim of the hotel company is provable, on the ground that bankruptcy of the transfer

company, even though involuntary, constituted an anticipatory breach of the contract. The fact that the hotel company had the right to terminate the contract after six months' notice, or after default continued for thirty days, is not considered to have any effect either in limiting the damages or the provability of the claim. Nor is the fact that the trustee in bankruptcy had the option to assume the contract considered material, and it is said that as he did not so elect, the matter is left as if the law had conferred no such election.

The case, it is submitted, is on all fours with the case at bar, except that in the case at bar we have to do with a lease of real estate and not a lease of privileges. In other respects the situation is almost exactly identical. There, there was no termination of the contract before the bankruptcy, and in the case at bar there was no termination before the receivership. There, the trustee might have assumed the contract and carried out its terms, and in the case at bar the receivers might have assumed the leases. There, the hotel company had the right to terminate the contract just as did the appellant in the cast at bar. Speaking of the cases arising out of the relation of landlord and tenant, the Court says, at page 590:—

> "Cases of the latter class are distinguishable, because of the 'diversity betweene duties which touch the realty, and the meere personalty.' Co. Litt. 292 (b), §513."

Whether by this the Court meant to lay down the rule that claims such as those of the appellant in the case at bar were not provable *in bankruptcy* does not appear, but the only real difference in principle in Lord Coke's time between leases of realty and leases of, or contracts for, privileges, was that in the case of leases of realty the rent was presumed to be paid out of the profits of the land and was a thing not merely in action because it could be granted over.

Co. Litt. 292 (b), § 513. To-day certainly, there can be no presumption that the rent is to be paid out of the profits of the land, and on principle there would seem to be no reason, if necessary to do justice, why the doctrine of anticipatory breach should not apply equally to leases of real estate and leases of personalty. The real object of bankruptcy, as was stated in *Williams* v. *Fidelity and Guaranty Company*, supra, is to relieve the honest debtor from the weight of oppressive indebtedness, and to hold that claims such as those of the appellant are not provable in bankruptcy would nullify the desired effect of the Bankruptcy Act and often saddle unfortunate bankrupts with claims of crushing magnitude from which they could not get a discharge. Such a result will be and should be prevented by the courts wherever possible.

We have commented on the above cases at some length because of the unfortunate suggestions by the lower courts in the case at bar that the bankruptcy rule might apply. It is submitted, however, that there is no reason why the Bankruptcy Act should govern a court of equity in a matter of this kind.

The Equity of the Situation.

There is no reason in law or in principle for a distinction between a lease and any other executory contract. A lease of a building for a term of ten years or more is very common. A location of some permanency is a valuable asset for a department store like those of the appellees in this case. A contract is made between landlord and

tenant, and each party is aware of his obligations, the landlord relying upon the credit of the tenant, which, in the case of a corporation, is based solely upon its assets.

In the case of any lease for a long term there is always the possibility that the tenant may become financially embarrassed, and in the Gardiner lease the very contingency which happened, namely; a receivership, was provided against, and the appellees both assumed the obligations of the lease with full knowledge that, in case of a receivership, their obligations were not to cease, and further, that, if they defaulted, the lessor was to have certain specific rights.

Both the Gardiner and the Russell leases were recorded in the Registry of Deeds for the proper county on August 8, 1911,—more than a year before the appointment of the receivers. This constituted notice to all the world of these leases, and any one who at that time had advanced credit to Butler & Company, or who thereafter advanced credit to either company, had full notice of conditions and full opportunity to avoid the consequences. In fact, merchandise creditors of the appellees had more notice of the possible claims of the lessors than they did of claims of other merchandise creditors.

If a merchandise creditor has agreed to sell goods to a corporation, and receivers are appointed for the corporation before the goods are delivered, it is settled that the creditor may prove any damages he sustains. There is no distinction between such a case and that of a lessor who gives a lease for a term of years to a corporation enabling it to conduct its business on a proper scale, and to build up its assets and good-will; and it is submitted that even without regard to the special covenants in the Gardiner lease, or to any particular rule of law adopted either in equity or in bankruptcy in the case of receiverships, the appellant should be given an opportunity to assert his claims in the only way in which he can ever get any payment on them.

The principles set forth in the case of *Pennsylvania Steel Company et al.* v. *New York City Railway et al.*, 198 Fed. 721 (C. C. A. 2d Circuit, 1912), it is submitted, are unanswerable.

The record shows (p. 43) that on the date of the appointment of the receivers, Butler & Company was insolvent in both the bankruptcy and common law senses of that term, and on that date Everybody's Store was unable to meet its debts as they matured in the ordinary course of business, and that before the final date set for filing proofs of claims, the receivers of both companies had sold and converted into cash all the assets, and in neither case was there sufficient to pay creditors in full, even though the claims of this appellant were not allowed.

The District Court in its opinion (Record, pp. 47–48) treated the appellant's claims as ones for "accelerated" or "future" rentals, and the receivers, both before the District Court and the Circuit Court of Appeals, argued that they were claims for accelerated rentals, and no doubt will so argue before this Court.

It is respectfully submitted that they are not claims for accelerated or future rentals, but claims for damages actually suffered by the appellant,—the loss of a bargain with the lessee and the assignee of the lease on account of their default under the leases. The lessee and assignee undertook to pay specified rentals. They defaulted in their contracts, and if the lessor can show at a hearing on the merits before the Court or a master that during the balance of the terms of the leases either the rental values of the premises were less, for proper reasons, than the rental specified in the leases, or that after proper efforts to re-let the premises he actually received less than the rental specified, the differences represent the damages he actually sustained. It is an opportunity to show these damages that he seeks.

The case is not like such cases as *In re Merwin and Willoughby Company*, 206 Fed. Rep. 116, and *Lamson Consolidated Store Service Company* v. *Bowland*, 114 Fed. Rep. 639. In those two cases the Lamson Consolidated Store Service Company had leased certain property to the bankrupts. Under the leases upon certain defaults it was provided that the lessor could repossess itself of the property and also hold the lessee liable for the rent specified in the leases for the balance of the term, regardless of what it was able to do with the property after such repossession. In other words, the clause in the Lamson Consolidated Store Service Company leases, if it had been upheld by the Court, would have permitted the lessor to "eat his cake and have it too."

The appellant in this case is not trying to prove claims for all the rentals specified in the leases for the balance of the terms, and also to keep all he is able to get for the premises from other tenants, but merely to prove for such actual loss or damage as he has suffered on account of the lessee's default. If he suffers no loss or damage he is to get nothing; if he can show that he has suffered loss or damage he should be entitled to prove his claims.

CONCLUSION.

It may not be a matter of great importance on what theory the claims of the appellant are allowed. The true rule may be that claims of this sort should be entitled to share in the receivership assets, either because liquidated and due before the time for filing claims has elapsed, or because a receivership by consent constitutes an anticipa-

tory breach. The important fact is that, on one theory or the other, claims of this sort, based on a fair and valid contract, are entitled in equity and justice to participate in the assets of the insolvent. Both appellees here are corporations, and both are insolvent, so if the claims of the appellant are disallowed he will be left with a paper right against the respondent corporations after they have been divested of all assets and have become mere shells. This, it is submitted, would not be justice.

Respectfully submitted,

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Supreme Court of the United States.

October Term, 1917.

No. 95.

Robert H. Gardiner, Trustee,
Petitioner,

v.

William S. Butler & Company, Inc., et al.,
Respondents.

Brief for Respondents.

Charles F. Choate, Jr.,
Frederick H. Nash,
Of Counsel.

ADDISON C. GEYCHELL & SON, LAW PRINTERS, BOSTON.

Supreme Court of the United States.

October Term, 1917.

No. 95.

ROBERT H. GARDINER, TRUSTEE,
PETITIONER,
v.
WILLIAM S. BUTLER & COMPANY, INC., ET AL.,
RESPONDENTS.

Brief for Respondents.

STATEMENT OF THE CASE.

The case is clearly and fully stated in the master's report (Record, p. 52) and in the opinion of Judge DODGE (Record, p. 58), which was adopted by the Circuit Court of Appeals (p. 92).

Since we shall adopt in this case the argument in the Filene's case, No. 93, so far as applicable, it is necessary to point out the differences between the two cases.

1. The Gardiner claim is against Everybody's Store, Inc., assignee of the leases, as well as against William S. Butler & Company, Inc., assignor.

2. Everybody's Store, Inc., came under the receivership November 7, 1912, as an intervening party praying that the Butler receivership be extended over it for its protection. There was no prayer for

distribution (Record, pp. 7-9). The corporation was treated as a solvent concern, temporarily involved in the receivership. On September 10, 1913, the receivers represented to the Court that they could not, out of current assets, satisfy the claims of creditors in full, and prayed for a judicial sale of the company as a going concern On September 16, 1913, the Court ordered sale by auction. Meanwhile, on September 11, 1913, an order requiring proof of claims on or before October 1, 1913, was entered (Record, pp. 20-24). The time was subsequently extended to December 12, 1913 (Record, p. 49), on which date the time for proving against William S. Butler & Company, Inc., expired (Record, p. 48).

3. The claimant was the lessor under the Gardiner lease (Record, p. 36) and the purchaser, on May 27, 1913, of the premises leased under the Russell lease (Record, p. 34). By the terms of the purchase he became entitled to all Russell's rights after June 1, 1913 (Record, p. 55).

The Russell lease gave the lessor no right of reentry on account of receivership.

The Gardiner lease gave the lessor a right of reentry "if a receiver . . . shall be appointed to take charge of any part of the property of, or to wind up the affairs of the lessee."

Both leases contained the usual provisions for reentry in case of default.

The receivers elected not to adopt the Russell lease on December 13, 1912, and vacated the premises December 30. They elected not to adopt the Gardiner lease on December 16, 1912, and vacated the premises December 31.

They paid for use and occupation from November 7 to December 31, 1912, but no rent has ever been paid by or in behalf of the lessee, William S. Butler & Company, Inc., or the assignee, Everybody's Store, Inc., since November 1, 1912.

Nevertheless, neither Gardiner nor Russell entered to terminate either lease until long after their rights to terminate had come into effect.

Apparently they preferred to trust that Everybody's Store, Inc., would emerge from receivership in a condition to pay the accrued rent, for Russell never entered, and Gardiner entered under his own lease on October 1, 1913, two weeks after the Court had ordered a sale of Everybody's assets. Indeed, when Gardiner entered under the Russell lease, about June 16, 1913, he petitioned the Court for leave to terminate the lease in order that he might be in a position to negotiate an advantageous disposition of the premises, but without waiving any rights against the lessee and assignee of the lease. The Court permitted him to enter upon said premises and terminate the lease without waiving any such rights (Record, p. 55).

In January, 1913, Gardiner, instead of entering under his own lease, petitioned the Court for authority to assume custody of the premises without jeopardizing his rights under the lease, "but that said lease and the obligations and covenants thereunder of said Wm. S. Butler & Co., Inc. and said Everybody's Store, Inc., shall remain in full force and effect as if the possession of said Everybody's Store, Inc. had continued undisturbed." This permission was granted (Record, pp. 15-18).

He subsequently entered and terminated the lease on October 1, 1913 (Record, p. 54).

As between lessor and lessee, the Russell lease gave no right to damages or indemnity against the lessee. It contained no provision for acceleration of future rent, or for damages in any form. Gardiner's right as against the lessee was, at most, a right to collect the future rent as it accrued. Probably, however, this right was cut off by his entry, as the order of June 16, 1913 (Record, p. 55), is hardly to be construed as preserving a right to future rent, in spite of the entry. It should be construed as preserving his rights then existing at the time of entry. Nevertheless, he claims, under the Russell lease, the rent from June 1, 1913, to the expiration of the lease, March 31, 1921, less the estimated rents to be obtained from the premises (Record, pp. 33, 34).

In substance, the claim is a claim for damages, although the lease provides only two alternatives open to the lessor: either to terminate the lease and retake the premises, or to refrain from entry and charge the accruing rent against the lessee.

The Gardiner lease, on the other hand, gave the lessor, upon termination, three elections of "liquidated damages" or "indemnity" as against the lessee, in identical terms with those clauses in the Filene's lease, and in the lease considered in *Slocum* v. *Soliday*, 183 Fed. 410. He claims from November 1, 1912, antedating the receivership, to October 1, 1913, date of termination, the rent, less sums received from reletting, $7847.54. From October 1, 1913, to May 1, 1920, he claims rent and estimated taxes, $106,466.69, less estimated receipts from future reletting,

$6424.09, leaving his claim, for the period after termination, $100,042.60 (Record, pp. 29, 30).

Neither lease contains any clause attempting to provide for proof of damages or other amounts in bankruptcy or receivership or any clause corresponding to the $20,000 a year provision of the Filene's lease.

4. As in the Filene's case, the receivers concede the claimant's right to prove for the rent accruing between November 1 and November 7, 1912. This amounts to $213.89. They make no contention against the allowance of this amount against both the assignor and the assignee of the leases (Assignment, Record, p. 43).

ARGUMENT.

I. The Claim under the Gardiner Lease.

From November 7, 1912, until October 1, 1913, the only claim of the lessor against the lessee was for the rent reserved in the lease. Until his entry on October 1, 1913, he waived his right to terminate the lease and proceed under the damage and indemnity covenants. Assuming that he could take custody of the premises when vacated by the lessee and its receivers and at the same time hold the lessee upon its rent covenant, it is nevertheless clear that at the date of receivership there was no claim against the lessee, either fixed or unliquidated, present or contingent. There was only the possibility that a claim for monthly accruing rent might arise in the future. The claim is frankly one for future rent, which, by the weight of authority in the absence of statute per-

mitting it, is not provable under any form of winding up.

In re Haytor Granite Co., L.R. 1 Ch. App. 77.
Horsey's Claim, L.R. 5 Eq. 561.
Abbott v. *Stearns*, 139 Mass. 168.
Bowditch v. *Raymond*, 146 Mass. 109.
Re Roth & Appel, 181 Fed. 667.
Slocum v. *Soliday*, 183 Fed. 410.

But the claimant may argue that since eleven months of future rent accrued before the Court undertook to distribute the assets—indeed before there was any petition for distribution—he ought to be allowed to prove for that amount by analogy to *Deane* v. *Caldwell*, 127 Mass. 242, which allowed a lessor to prove against the insolvent estate of a deceased person future rent up to the expiration of the time for presenting claims. This contention, if sustained, would allow him to prove for $7847.54.

It will, however, bring the question of provable claims into the utmost confusion, if any date other than the date of filing the bill or appointment of receivers—in this case the same—is to be taken as the date for determining what claims against the estate exist. If a claim exists on that date—as, for example, an unliquidated breach of contract, which is too uncertain to be reduced to dollars and cents, but which becomes fixed in amount before distribution is decreed—it is proper to allow it. But that is quite a different matter from allowing claims to come in and participate which never existed at all until the Court took possession of the assets. Here there was

no claim on November 7, 1912. It lay entirely within the option of the lessor whether he would terminate the lease and relet the premises on November 7, minimizing his damages, or whether he would do nothing and look to the rent covenant clear up to the time for distribution. To permit a claim to rank when the existence, and, to some extent, the amount of it, lies within the discretion of the claimant *after receivership* is not justice (see Opinion of DODGE, J., Record, p. 82).

When the Court takes over the assets of a corporation, whether for certain present or possible future distribution, all persons find their rights to deal with the corporation or to impose obligations upon it cut off at that moment. They must take its obligations as they find them then.

From October 1, 1913, the date of entry, until the end of the lease, the claim is, in substance, for the acceleration of all the future rents and taxes, less the estimated rental value of the premises.

It does not differ in principle from the claim of William Filene's Sons Company, barring the $20,000 a year element of that claim. We refer to our argument in that case.

II. The Claim under the Russell Lease.

This claim is for future rent from the date when Gardiner became entitled to the rents by purchase from Russell, June 1, 1913, until his entry June 16, 1913. This part of the claim is covered by the foregoing argument.

The claimant proceeds, notwithstanding his ter-

mination of the lease, to prove for future rent to the end of the lease, less the estimated rental value of the premises. This part of the claim calls for these additional suggestions.

Since the lease contained no provision for damages or indemnity upon its termination, the lessor's only remedy, even as against the lessee, upon entry for default, was to take back the premises and sue for rent then accrued.

> *Sutton* v. *Goodman*, 194 Mass. 389.
> *Weeks* v. *International Trust Co.*, 125 Fed. 370.

The lessor could not take back the premises and also hold the lessee for future rent, even by giving credit for the estimated rental value. The order of June 16, 1913, by which the Court authorized Gardiner "to enter upon said premises and thereby to terminate said lease without waiving any rights he may have against the lessee thereunder or assignee thereof" (Record, p. 55), cannot be construed to give him back the premises and a right to rent from the former lessee at the same time or to give him a new right to damages not contained in the lease. Therefore, even as against the lessee, if it were now solvent, his rights for the future ceased upon entry.

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